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DAF/COMP(2010)16

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

08-Jun-2010

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN INDONESIA

-- 2009 --

*The attached document is submitted by Indonesia to the Competition Committee under Session VII "Annual Reports on Competition Policy" FOR DISCUSSION at its forthcoming meeting to be held on 16-17 June 2010. The document replaces the 2009 report and consists of a 10-year report on Competition Policy followed by a document on the overall aspects of the Indonesian Competition Law Implementation.*

JT03285079

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## I. TEN YEARS OF KPPU

### 1. Introduction

1. In 1999, Law Number 5 Year 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition was ratified by B.J. Habibie as the President of the Republic of Indonesia at the time. A year later, the Commission for the Supervision of Business Competition (KPPU) was established to be the frontliner for the enforcement of law on fair business competition.

2. On June 7, 2010, it has been ten years KPPU performs its tasks in enforcing business competition law in Indonesia. In this ten years period, various achievements have been attained by KPPU, especially in promoting the achievement of fair business competition climate.

3. In such period, a UN body, IGE-UNCTAD has extended an appreciation to KPPU on its good performance in the implementation of competition law and policy in Indonesia. KPPU is said as the portrait on *“how a young and dynamic competition authority can be a model for other countries”*.

4. As mandated by the Law, KPPU has the tasks and authorities to prevent and take action on the violation of business competition law and provide advice and opinion to the government and related agencies. Despite of the fact that in the performance of its tasks and authorities KPPU encounters many obstacles, it has exerted various efforts in enforcing the competition law in Indonesia;

5. In ten years period of business competition law enforcement, KPPU records that 85% cases handled is still dominated by the tender conspiracy, particularly tenders at the government institutions, which has the potency to grow the collusion and nepotism. In addition, the cases also relate to cartel, misuse of dominant position, merger and acquisition as well as other kind of conspiracy, committed by business actors with an expectation to earn supernormal profit. By this profit, business actors are able to set aside a large amount of fund as a potential fund to commit the corruption practice in a bid to maintain the status quo or even conduct business expansion. Finally, the bad government officials will be stronger and richer thanking to the gift from some business actors. Policy and regulation are used as a means to make then richer and maintain their power. This practice continuously occurs under the win-win principle, the vicious circle is difficult to break.

6. In order to support the commitment achievement and implementation of the supervision function of the business competition law, KPPU has conducted 6 measured activities in which the performance and outputs have been generally increasing. These activities include:

- Law enforcement
- Industrial review
- Implementation of policy evaluation
- Giving advice and opinions
- Information dissemination and advocacy
- Institutional co-operation and devolvement

7. KPPU has strengthened its achievement indicators in a number of fields, namely, the decreasing rate in several sectors (particularly telecommunication), smoother supply and distribution, better quality of public services and more transparent and competitive goods and service procurement as well as more transparent and competitive business permit issuance. Even upon the enactment of Law Number 5 Year 1999, the regulation and policy on business permit procurement has adopted the principle of fair competition, namely transparency and non-discrimination. In line with this, KPPU will keep supervising the implementation of some regulations/policies, particularly in relation to the procurement practice/business permit issuance at the field.

8. Finally, the performance of KPPU will be always in line with the better awareness of the community and decision maker, change of behaviours, better economic performance and welfare improvement.

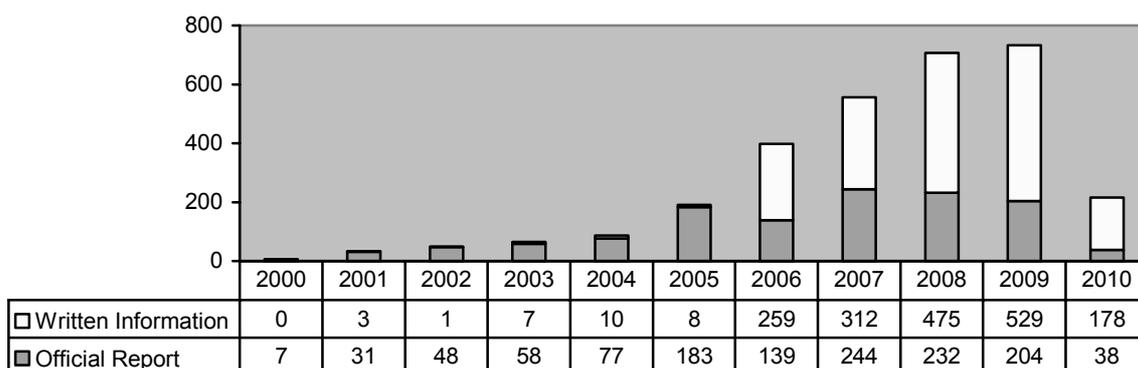
9. Below is the performance of KPPU as the holder of the supervision mandate as set forth by Law Number 5 Year 1999 within the period of last ten years.

## 2. Law Enforcement

10. Ten years after its establishment, KPPU has indicated an improved output in law enforcement activities. It can be seen from the number of cases handled for which KPPU receives two types of reports, i.e. written report and information.

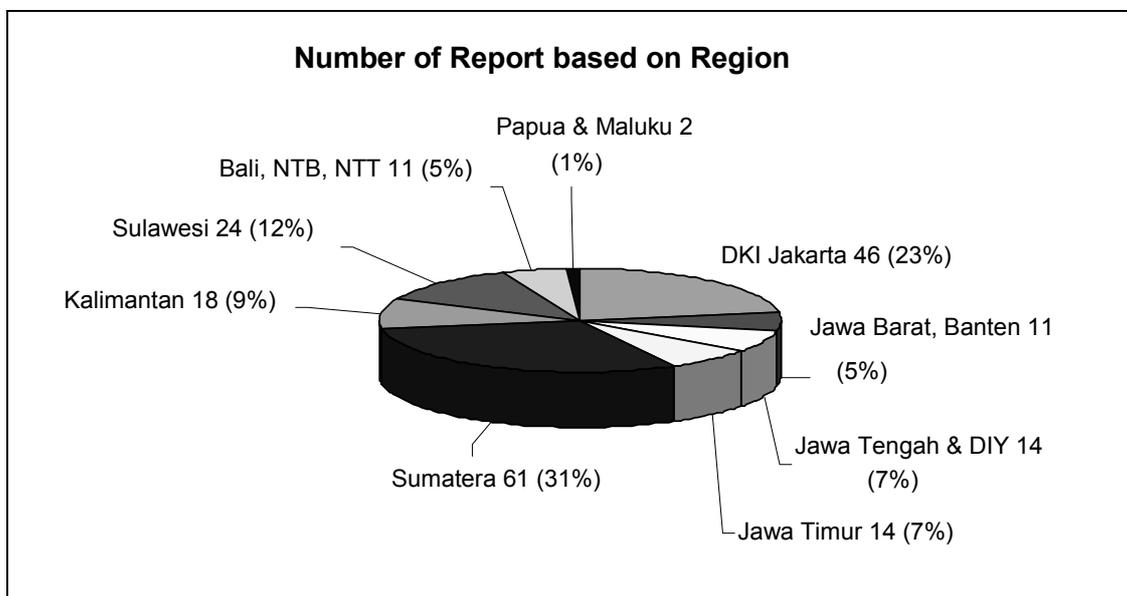
11. The public is more familiar with KPPU. It can be seen from the number of reports filed tends to increase from year to year. It means that the public has a better understanding the substance of Law Number 5 Year 1999 and the types of its violation. As of May 2010, KPPU has received 3,043 reports. Table below indicates the number of reports received by KPPU in the period of 2000 to May 2010.

**Number Reports Received by KPPU in the period 2000-2009**

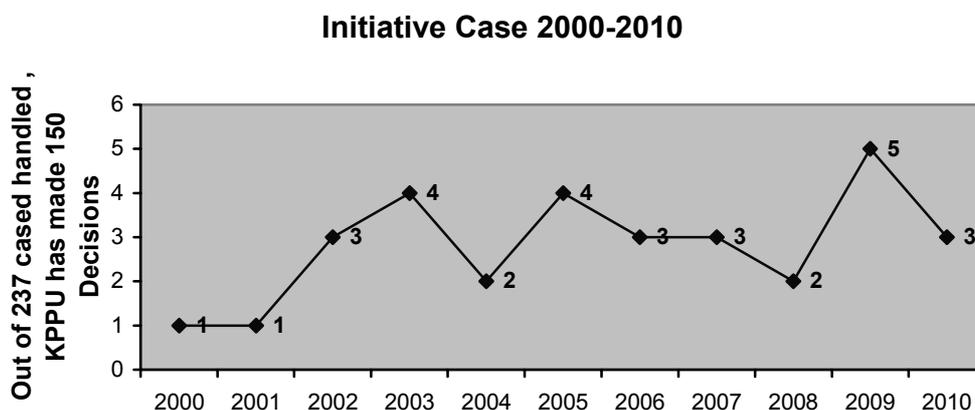


12. In the above graph, it can be seen that the public prefers to file written information to official report as indicated by the number of written information submitted. The 2010 data is made as of May 2010.

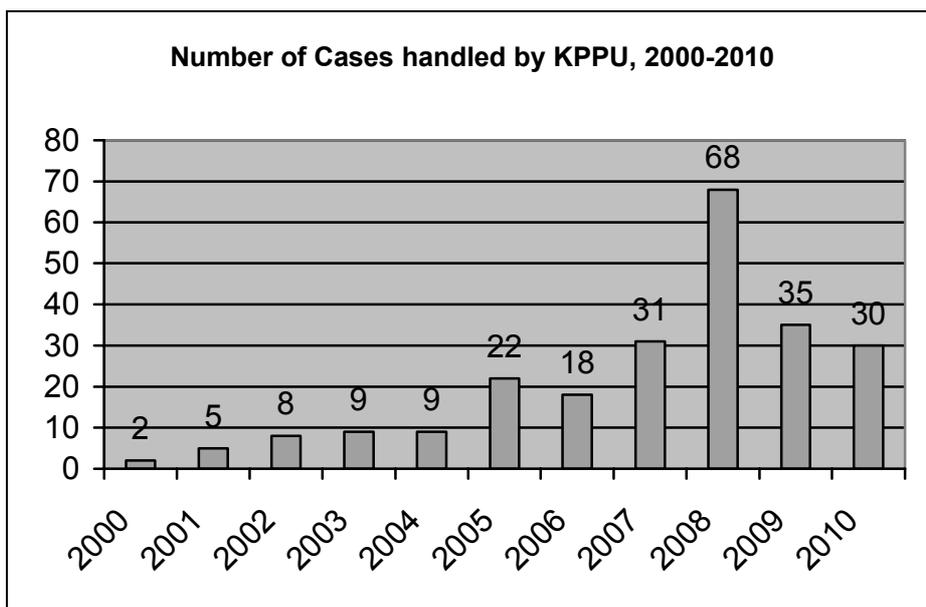
13. Viewed from the origin of the reports, most of the reports submitted from public living in Sumatera area as indicate by the following graph:



14. In addition to the case from the community' report, KPPU also handles cases deriving from its investigation, called as the initiative case. In this matter, KPPU conducts supervision and investigation on the current business competition issues. The number of the initiative case handled by KPPU within last ten years tends to increase.



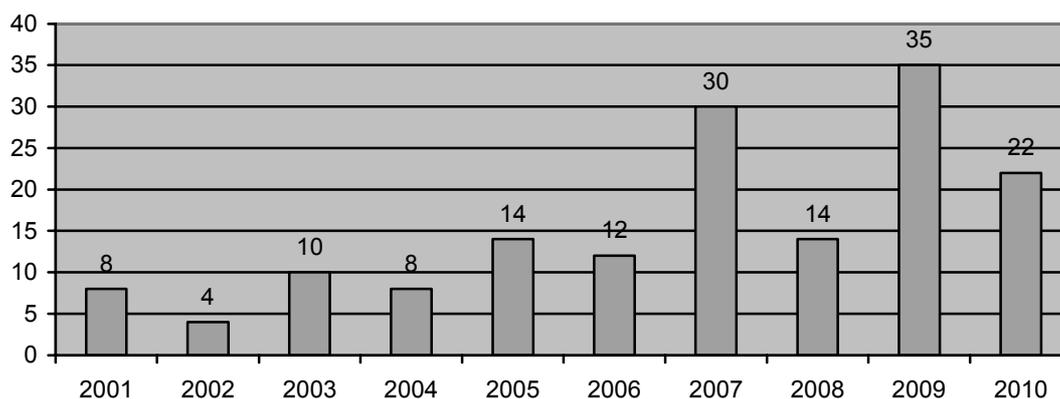
15. Within ten years, KPPU has handled 237 cases. The composition of the cases handled by KPPU indicates that 85% of the cases relate to the procurement of goods and services for the government. Competition cases in the procurement of goods and services relate to the horizontal and vertical conspiracy.



### 3. Monitoring of Business Actors

16. KPPU started to conduct the monitoring activities since 2001 and has monitored 8 sectors since the first year. In 2002, the monitoring activities were more focused on such sectors as telecommunication, transportation and oil. Thereafter, the objects of monitoring have been increased in line with the expansion of the sector to be monitored and the monitoring coverage following the establishment of the KPPU’s Regional Offices. The table below illustrates the monitoring activities during the period of 2001-April 2010:

**Monitoring of Business Actors, 2001-2010**

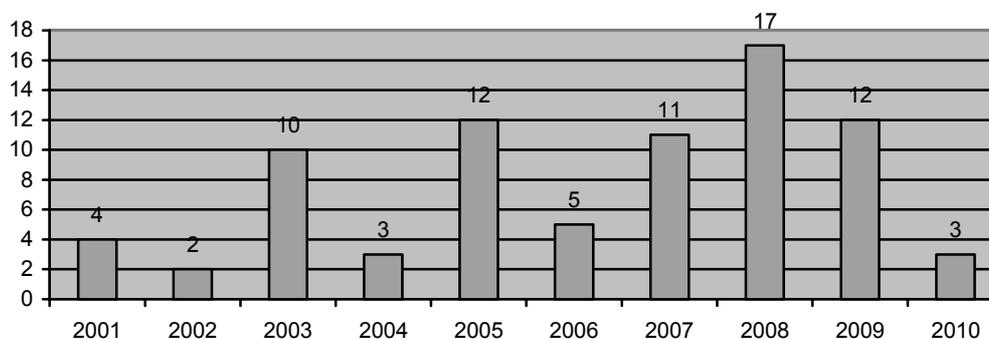


### 4. Evaluation of Government Policy

17. As the final result of the evaluation of government policy, KPPU provides advice and opinions to the government covering several economic sectors. Thanking to the intensive co-operation and co-ordination with the government, the majority advice an opinions provided by KPPU have received positive response. However, some advice and opinions delivered by the Commission do not receive any

response. In order to overcome this problem, KPPU has intensified the co-ordination with government in relation to the advocacy of fair competition policy. The chart below illustrates the number of advice and opinions provided to the government during last ten years of the establishment of KPPU:

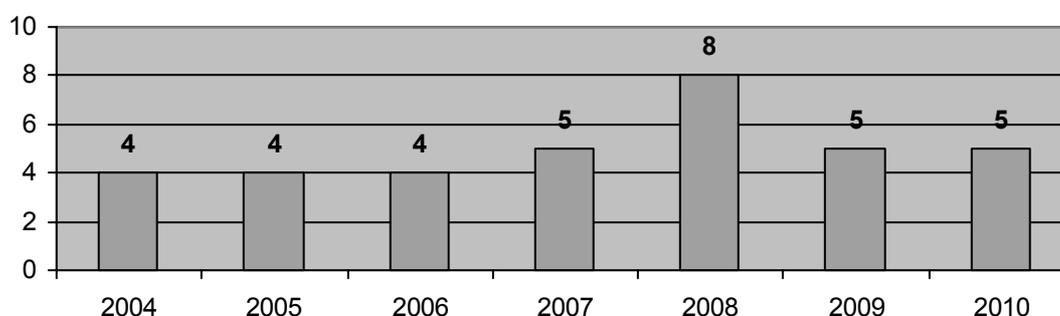
**Advice and Opinions Provided by KPPU, 2001 - 2010**



## 5. Industrial and Trade Analysis

18. During the period of 2000-April 2010, KPPU has conducted 35 industrial and trade analysis. The industries analysed include strategic industrial sector related to the business competition issues and/or having a potency to the unfair business competition practice.

**Kajian Industri dan Perdagangan KPPU 2001 - 2010**



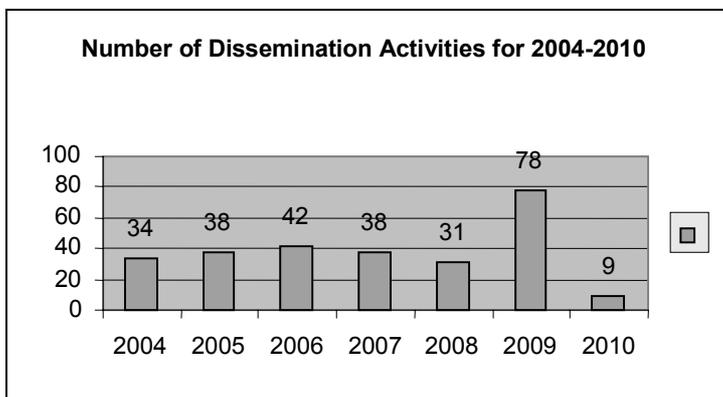
**Industry and Trade Analysis Conducted by KPPU, 2001-2010**

Year	Sectors
2004-2005	Fertiliser, pharmacy, pulp and paper, retail, telecommunication, oil and gas, transportation, banking
2006	Airport, insurance, fertiliser
2007	Telecommunication, retail, rice, industrial structure mapping
2008	Pharmacy, oil and natural gas, logistic transportation
2009	Position and roles of state-owned enterprises (BUMN), financing and insurance, medical services, electricity, position of business competition in Indonesian economy
2010	Impact of Implementation of Free Trade Area on business competition, banking, steel, air transportation, role of business competition in the perspective of consumer welfare

**6. Dissemination on Fair Competition**

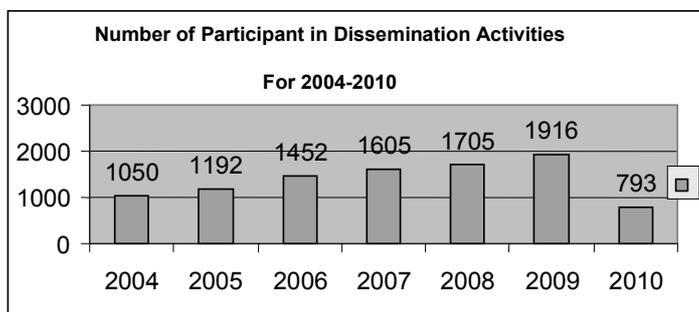
19. In ten years, KPPU had conducted several dissemination and advocacy activities on government, business actor, journalist, law expert, and society.

**Table 9**

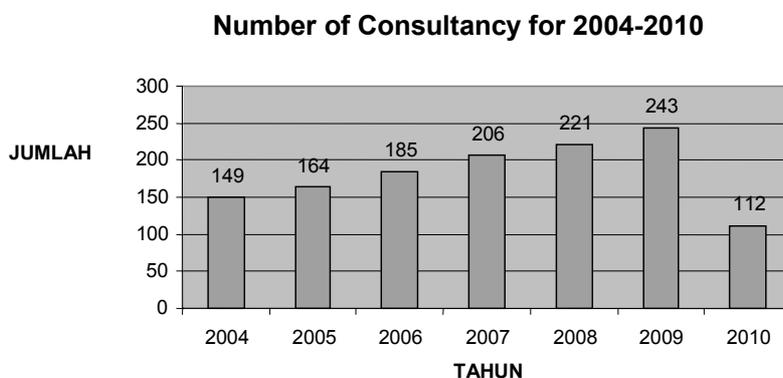


20. Dissemination activities conducted consist of journalist forum and development of national competition forum with the stakeholders, including judiciary, legislative, and local government that attended by more than 8,950 participants in total.

**Table 10**



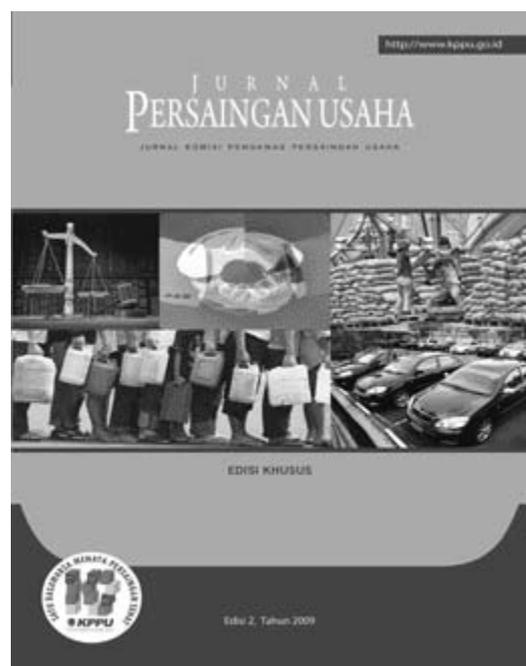
**Table 11**



21. Apart from lower a quite coverage business actors for direct dissemination, KPPU also conducted dissemination through website (<http://www.kppu.go.id>) and social network such Twitter and Facebook. Using the official website, KPPU open a interactive online discussion through specific e-mail address ([infokom@kppu.go.id](mailto:infokom@kppu.go.id)). KPPU also publishes routine publications, including newsletter Kompetisia (in Bahasa and English version) and magazine, Kompetisi.

## 7. Textbook and Curriculum on Competition Law

22. In order to achieve KPPU as centre of competition knowledge, KPPU publishes yearly competition journal. Moreover, in order to develop competition law curriculum for universities, KPPU initiated a textbook for competition law study as the main reference by lecturers at all universities.



## 8. National and International Co-operation

### 8.1 National Co-operation

23. To build an integrated competition justice system and to develop competition policy, KPPU entered co-ordination and co-operation with law enforcement agencies, departments and local governments, including formal co-operation in the form of a Memorandum of Understanding. In April 2003, a MoU signed with the Capital Market Supervisory Agency (Bappepam) and followed five months later with the Statistic Indonesia (BPS). In 2006, formal co-operation with the Ministry of Telecommunications and Information Technology (Menkominfo) and the Corruption Eradication Commission (KPK) were also signed. While in 2010, KPPU entered into a partnership with the Indonesian Financial Transaction and Reports Analysis Centre (PPATK) is established to assist the Commission to obtain the financial transactions data as one of the supporting information used before the Commission Hearing.

24. KPPU also established good co-operation with national institutions to increased awareness for policy makers on the importance of competition policy. This is demonstrated by the formation of a special unit in the Co-ordinating Ministry of Economic Affairs in the field of business competition, acting as

Commission's counterpart in the creation of a competition policy that have a significant impact on improving the national competitiveness.

## **8.2 *International Co-operation***

25. KPPU viewed the need of a regional forum to contribute to the development of competition law and policy. To do this, KPPU in 2003 initiated the ASEAN Conference on Competition Law and Policy. The forum that followed by Indonesia, Thailand and Vietnam in gave birth to a informal competition forum in 2005, the ASEAN Consultative Forum on Competition (ACFC). Along with the ASEAN Leader's commitment to in 2006 to create a regional economic community by the year 2015, ACFC members had agreed to the transformation of the ACFC to the ASEAN Expert Group on Competition (AEGC) in 2008 that defined as a regional working group within the ASEAN Secretariat.

26. In order to support the ASEAN Economic Community (AEC) in 2015, AEGC set three priorities as a means to achieve target on the promotion of competition policy stipulated in the AEC Blueprint, namely regional guideline, handbook, and capacity building programmes. KPPU is currently the Vice Chairman of AEGC and will lead AEGC in 2011 respectively.

27. In a broader scope, KPPU began to inculcate its position in two prestigious entities, namely the Organisation for Economic Co-operation and Development (OECD) for Europe region, and the Asia Pacific economic co-operation (APEC) for Asia Pacific region. At the OECD, KPPU was an invited observer in 2002. Three years later, in 2005, KPPU became a regular observer, the highest membership status of institutions from non-OECD countries.

28. While in the APEC, KPPU is a member of one of the forums, namely Competition P and Law Group (CPLG) and member of the Friend of the Chair (FotC) for the Economic Community (EC) in the field of competition policy. On this forum, KPPU actives in the endorsing the APEC OECD Checklist on Regulatory Reform and facilitate APEC capacity building by successfully hosted two international seminars in 2007 and 2008, and two trainings in 2005 and 2008.

29. In the UN forum, KPPU foster good co-operation with the United Nations Conference on Trade and Development (UNCTAD) in providing advice and support programme to strengthen competition law in Indonesia, which lead to a peer review on Indonesia in 2009. Besides actively involved in several international forums, KPPU maintains its good co-operation with competition agencies like United States (U.S. FTC), Germany (Bunkartelamt), Japan (JFTC), Korea (KFTC), Taiwan (TFTC) and Australia (ACCC). KPPU also received assistance from several international donor agencies such as UNCTAD, OECD, JICA, GTZ, InWent and World Bank.

30. In the future with the internal concentration for international co-operation, KPPU will strengthen its role KPPU to be an important part of the international competition community in OECD and the International Competition Network (KPI). As well as to strengthen its competitive position as a competition central to the South and Southeast Asia regions in general.

## **8.3 *Institutional Development***

### **8.3.1 *Independent Budget Management***

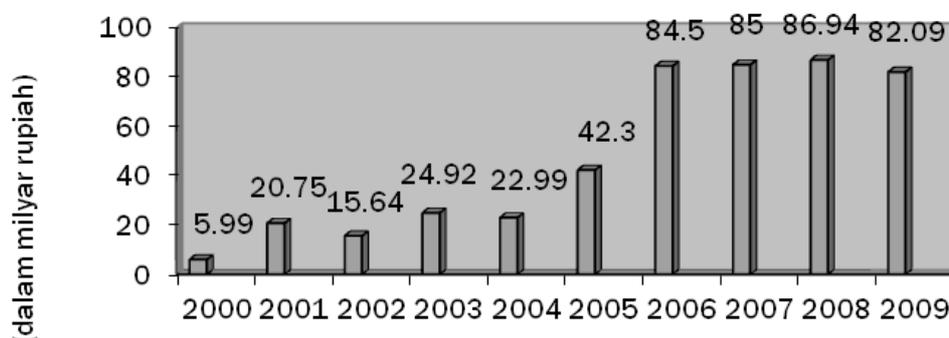
31. Associated with the KPPU position as an independent commission, its own nomenclature separate from the Ministry's budget is a form of trust to the KPPU. In 2001, KPPU's budget was a working unit of the Ministry of Trade and Industry's budget. Later in 2005, KPPU's budget was part of working unit of the Secretariat General of the Ministry of Trade, hence the accountability of the budget implementation is consolidated with the Ministry.

32. Starting in 2010, KPPU’s budget obtains its own nomenclature, separate from the Ministry. With this separation, KPPU can manage its budget independently and may create smooth operation at the Commission, hence the Commission could achieve its vision and mission in accordance with the needs and stipulated time.

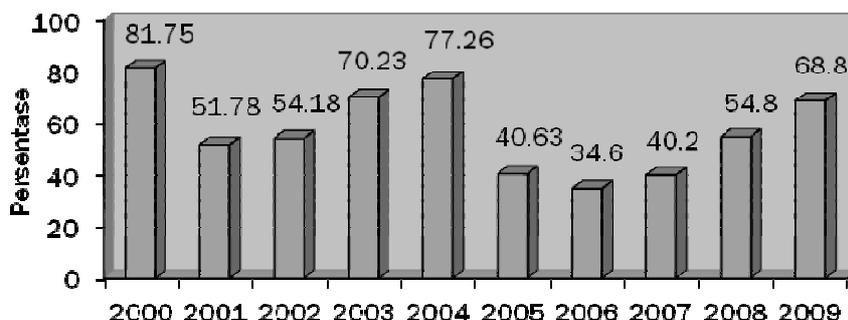
8.3.2 *Budget Utilisation*

33. In ten years, KPPU has utilised the State budget for IDR 196 billion as drawn by the following chart.

**Alokasi dan Penyerapan Anggaran**



**Budget Allocation  
Persentase Penyerapan Anggaran**

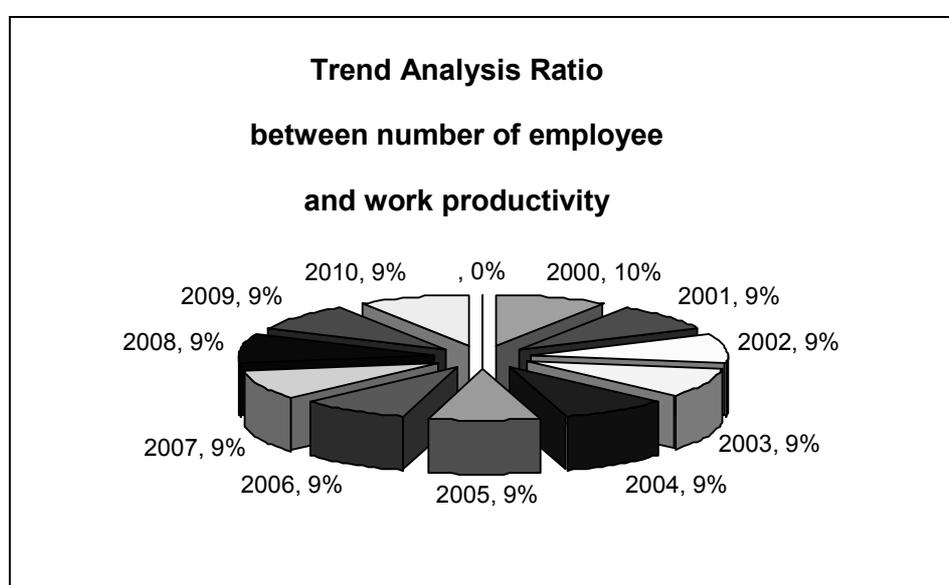


**Budget Utilisation**

8.3.3 *KPPU Employee Performance*

34. At the institutional level, KPPU succeeded in perfecting series of internal regulations, including the publication of the Commission Regulation on Code of Ethics and Working Groups. By strengthening disciplinary regulations and increasing employee competency, a positive trend is shown in performance, that can be measured by the trend analysis ratio (positive correlation between the number of employees and the level of productivity). This can be seen from the following chart.

Year	Number of Staff/year	Number of Case/year	Number of Advice and Recommendation/year
2000	10	2	-
2001	31	5	2
2002	44	8	4
2003	70	9	10
2004	81	9	3
2005	88	22	12
2006	104	18	5
2007	163	31	11
2008	206	68	17
2009	294	35	12
2010	301	30	3
<b>Total</b>		<b>237</b>	<b>79</b>



## 9. Achievements in a Decade

35. The KPPU undertook systematic performance in 10 years to achieve results and achievements including:

### a) Tariff and Price Reduction

36. With the Decision on SMS Cartel, KPPU stops the behaviour which leads to direct impact on a reduction on SMS tariff. The direct impact of fair competition can be felt by the consumer through tariff reduction for 50-70%, in which the consumer are now enjoying cheaper tariff of IDR 100/SMS (compare to IDR 350/SMS in 2004 to 2008). This means that the IDR 250 reduction has provided income savings for approximately IDR 5.5 billion per year to more than 150 million subscribers/consumer.

37. In addition, there are achievements in terms of significant tariff reduction and increase in services offered in the aviation industry since the application of KPPU suggestions. Estimated cost savings in flight services during KPPU advocacy is estimated at IDR 1.9 trillion/year. Moreover, associated with excessive fuel surcharge practice by several aviation companies, KPPU able to stop consumer loss for at least IDR 5.1 trillion to 13.8 billion during the period of 2006-2009. Meanwhile for cooking oil industry, KPPU also

prevent a consumer loss that might reach IDR 1.2 trillion for cooking oil and IDR 374 billion for bulk cooking oil.

b) Increased State Income

38. Although it is not a goal for law enforcement, KPPU also imposed fines and compensation that can be treated as a state revenue. The number of fines imposed during 2001-2010 is ranging from IDR 808,809,494,090, while number of compensations accounted for IDR 919,691,129,987. Both accounted for IDR 1,7 trillion. Meanwhile, KPPU only used the state budget at IDR 196 billion.

c) Formation of Policies adopted Fair Competition Principles

39. Among the policy change because KPPU's advice was tariff policy in aviation industry on 2001. Initially, the tariff fixed by the association of flight operators, so the price is never less than the floor price which economically will harm consumers. KPPU promote the Minister of Transportation to revoke the authority of mentioned business association and eliminate the floor price. As a result, the ticket price is dramatically reduced and allows the community to enjoy a cheap flights service. Moreover, the beliefs of others ministries and legislative also increased. This can be shown by additional authority to the Commission to supervise partnership in accordance with the Law No. 20/2008 on Micro, Small, and Medium Scale Business. This creates a challenge as well as indicator of the increasing public confidence and other agencies on the Commission.

d) Legal Certainty in understanding Provisions in the Law No. 5/1999

40. Article 35 letter "f" of the Law No. 5/1999 mandated KPPU to publish guideline and or publication related to the Law, including the Commission Regulation to create understanding and legal certainty. The guidelines, among others, are:

- guideline of Article 1 number "10" on relevant market;
- guideline on the prohibition of tender conspiracy;
- guideline on interlocking directorate;
- guideline on administrative measures;
- guideline on Article 50 letter "a" on exclusion for application of government regulation;
- guideline on intellectual property right;
- guideline on Article 51 on exemption for state-owned enterprise and any company appointed by a Law;
- guideline on pre-merger notification;
- guideline on case handling.

e) Increase of Affirmation on KPPU Decision by Judiciary

41. Resulting from the decision of KPPU, some businesses filed objections and cessation. Estatically, the Supreme Court affirmed 73% or 24 of 47 KPPU decision on the cessation process. This shows that the courts have same views on the KPPU's evidences and facts, as well as meeting the due process of law and applicable decision.

f) Increased of Quality and Awareness to Fair Competition in Public Procurement of Goods and Services

42. In terms of handling cases for 10 years, the composition of cases handled by KPPU indicates that approximately 85% of cases related to public procurement of goods and services. Consistency in law enforcement on procurement and other competition issues raises awareness of the relevant parties to ask for consultancy to KPPU before the bidding process is started.

g) Increased of International Acceptance on the Commission

43. On 8 July 2009, the KPPU receive an acknowledgement at the Intergovernmental Group of Experts on Competition Policy and Law, a main meeting at the United Nations Conference on Trade and Development (UNCTAD), for its good work in the implementation of competition law and policy in Indonesia. The KPPU called as a portrait of "*how a young and dynamic competition authority can be an model for other countries*".

44. Finally, the performance of KPPU will always be consistent with the purposes of the Law No.5/1999 to improve national economic efficiency, ensuring same business opportunities, prevent monopolistic practices and creating efficiencies in business to improve people's welfare.

## II. COUNTRY REPORT: INDONESIAN COMPETITION LAW

### 1. General Framework on Economic Policy and Development

#### 1.1 Foundations and History of Competition Policy<sup>1</sup>

45. Indonesia is a country of 245 million inhabitants, living on almost 1800 islands, organised into 32 local governments. Following fifteen years of economic and institutional reforms, Indonesia's per capita income in 2008 grew to US\$ 2,271 – almost double that in 2004<sup>2</sup>, although still lower than that of its Asian neighbours such as Malaysia (US\$ 6,948), Singapore (US\$ 30,000) and Thailand (US\$ 3,737).

46. Indonesia has a market-oriented economy in which government still plays a significant role. The Indonesian economy grew at high rates from the 1970s to late 1990s. At that time, the country was considered to be a successful newly industrialising economy and an emerging major market. Nevertheless, the rapid economic growth hid some important institutional weaknesses that were exposed by the Asian financial crisis of the 1990s. It became apparent that the legal and judicial systems were very weak and ineffective; there was no effective way to enforce contracts, collect debts, or sue for bankruptcy. Prudential regulation of the banking system was poor. Various distortions, including non-tariff barriers, rent-seeking, domestic subsidies, export restrictions and other barriers to trade, all frustrated economic growth. At the end of the 1990s many institutional reforms were undertaken, with the Competition Law being among them.

#### 1.2 History

47. Indonesia's 1945 Constitution enshrines the democratic principles on which the Indonesian economy is to be based and provides direction on its orientations. Article 33 of the 1945 Constitution provides normative guidance for the State's economic policy. Sections "a" and "b" of Article 33 state that Indonesia's economic development should be anchored by the principle of a people's democracy encompassing a commitment to social justice for all achievable through market mechanisms that are aimed at maximising social welfare. Accordingly, the State plays a key role in the achievement of economic goals and objectives.

48. According to the 1973 State Policy Framework, known as the *GBHN (Garis Garis Besar Haluan Negara)*, co-operative effort rather than a "*free fight liberalism*" system that exploits human beings is the main driver of development. The Policy Framework consigns the control of all natural resources to the State.

49. From 1973 to 1998, the State Policy Framework provided the concrete normative philosophy governing Government's role in preventing unfair business practices. The philosophy was explicitly articulated by various Congressional Decrees (*Ketetapan MPR*) including, No. IV/MPR/1973 on Economic Development, TAP MPR RI No. IV/MPR/ 1978 on Economic Development for Small Business

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<sup>1</sup> This report is based on documents translated into English. The documents, including Law n. 5, use terminology that is not usually employed by most competition laws and authorities worldwide. Some of the concepts are well established in economic theory, but there are deviations in technical language. The terminology used will likely result in difficulties in application and misunderstandings for the international antitrust community interacting with the Indonesian system.

<sup>2</sup> At prevailing market rates.

Enterprises and Private Businesses, TAP MPR RI No. II/MPR/1983 on the State Policy Framework on Economic Development for Private Businesses and Small Medium Enterprises, TAP MPR RI No. II/MPR/1988 on the State Policy Framework of Economic Development of the National Enterprises, TAP MPR RI No. II/MPR/1993 on the State Policy Framework on the Economic Development of the National Enterprises and TAP MPR RI No. II/MPR/1998 on the State Policy Framework of the Economic Development of National Enterprises. These decrees provided the ground rules for attaining the necessary conditions to ensure that all enterprises or business actors, including conglomerates or small and medium-sized enterprises were afforded equal opportunity to thrive. Nevertheless, the evidence suggests that economic growth and development were significantly hampered by unfair competitive advantages granted to a few conglomerates through discriminatory regulations and other monopolistic practices that violated the principles of Article 33 of the 1945 Constitution.

### ***1.3 Economic Development before the Competition Law was established***

50. In the years immediately preceding the enactment of Law No.5/1999, policy makers and the Indonesian public had come to believe that market distortions were being caused by a few businesses that had strong ties to the political elite. It was believed that, through these relationships, businesses obtained privileges, discretionary funding or special treatment with a consequent rise of concentrated market structures characterised by a few strong conglomerates, which exploited their economic power at the expense of consumers and small- and medium-scale businesses. Thus, concentrated market structures were viewed as created and maintained by crony capitalism.

51. The perceived conduct of these conglomerates left the public with a lingering aversion to big business and a tendency to equate all conglomerate behaviour with anticompetitive conduct resulting in widespread misconceptions about business behaviour in general, further compounded by a general lack of understanding of the legal and economic meanings of the term “fair competition”.

52. Fair competition is a complex concept that is often misconstrued. The broader objectives and goals of a country’s competition policy often determine what it means in each country. In the case of Indonesia, Government intervention in the market has tended to reinforce misconceptions of what is fair and unfair competition and how well-functioning markets should operate. A case in point is the BPPC (*Badan Penyangga Pemasaran Cengkeh*) that regulates clove trade (*BPPC*). The Board is the exclusive buyer and seller of cloves, the vast majority of which are sold domestically for use in the manufacture of Indonesian cigarettes. Since its formation, clove prices have drastically declined and farmers have been discouraged from producing cloves despite the fact that the aim of the BPPC is to ensure price stability and security of supply of cloves in the national market. The clove industry is one example of how government intervention and political interests have resulted in market distortion. Other examples of extensive government intervention in the economy that have had negative implications for competition exist in the orange, nutmeg, sandalwood and rattan markets. The government has also intervened in the automobile industry with the National Automobile Project (*Proyek Mobil Nasional*) known as *MOBNAS*.

53. In addition, various studies have shown that in the past thirty years Indonesian industrial policy has caused high levels of concentration in several markets and industries. The structure of the industrial sector is, for the most part, oligopolistic, with more than 40% of the firms in the industrial sector having market shares of 40% or greater.

54. A competition policy began to emerge when the New Order regime ended in May 1998 and President Habibie’s administration began its transition period of rule. There have been quite a few changes since then and progress has been made in the legal arena as part of Indonesia’s commitment to the International Monetary Fund (“IMF”) loan programme. Experts have noted that the IMF played a significant role in requiring the government to implement deregulation. The IMF Letter of Intent clearly played an important role in requiring changes in both legal and economic policies.

55. As a response to strong public sentiment against the harm that the conduct of monopolies and some conglomerates had up to 1998 inflicted on the economy with perceived Government consent and protection, Indonesia adopted a competition law entitled the “Anti Monopoly and Unfair Business Practices” Law. Subsequent to Indonesia’s enactment of Law No. 5/1999, the Special General Assembly (the “MPR”) reiterated what was stated in its Decrees on economic reform and restructuring (Decrees No. X/MPR/1998 and No. XVI/MPR/1998).

56. For example, MPR Decree RI No. X/MPR/1998 on the Principles of Development Reform in Accordance with the Rescue and Normalisation of National Life as the Nation’s Philosophy, in Chapter II, General Condition, Sub A. Economy, states:

*“...The development achieved during the 32 years of the New Order regime has substantially declined because of the serious economic crisis, which started in the middle of 1997 and continues. The earlier economic foundation was presumed strong, but in fact has shown that it was not resistant to external turmoil and this is exacerbated with micro- and macro economic problems. This is due to the inadequate implementation of a national economic policy, which is not in accordance with the guidance under Article 33 of the 1945 constitution where it shows clear monopolistic practices. The businesses, which are close to, the elite government officials received substantial special priorities, which have further led to a social gap and other problems. The fundamental weakness was also due to the exclusion of the people’s economy, which in fact relies on the natural resource base and human resources as its comparative and competitive advantages. The existence of conglomerates and a few strong business actors, not supported with the true spirit of entrepreneurship, has caused the economy to be tenuous and noncompetitive...”*

57. Similarly, MPR RI Decree No. XVI/MPR/1998 on Political Economy in Accordance with Economic Democratisation provides guidance on the new Indonesian paradigm. The decree shows that the Indonesian government has learned from the past and realised that the economic crisis and market distortions resulted from the weak economic foundation created by the behaviour of a few conglomerates. In order to prevent this sequence of events from reoccurring, the MPR issued MPR RI Decree No. IV/MPR/1999 on the State Policy Framework, General Conditions in Chapter III on the Vision and Mission of the state economic policy. Hence, Indonesia is currently endowed with a strong legal foundation to implement its national economic objectives.

#### **1.4 Economic Goals of Competition Policy**

58. The purposes and objectives of Law No.5/1999 are defined in Articles 2 and 3 as follows:

- a) “To safeguard the interests of the public and to improve national economic efficiency as one of the efforts to improve the people’s welfare.
- b) To ensure the certainty of equal business opportunities for large, medium, and small-scale business actors.
- c) To prevent monopolistic practices and unfair business competition.
- d) To create effectiveness and efficiency in business activities.”

59. The objectives of the Indonesian competition policy focus on public welfare and the maximisation of consumer welfare and national efficiency achieved through the process of fair business competition and equal opportunity for small and medium scale businesses. In the light of Indonesia’s practice of protecting small businesses, it has been suggested by some commentators that the law is designed to limit the development of big businesses. The extent of the exemptions contained in the law,

particularly in Article 50, lends credence to this belief. Article 50 exempts businesses that qualify as co-operatives or small businesses. The objective of an equal and level playing field for every business can be distorted by unclear exemptions, which, in the long run, can threaten competition policy interfere with the competition process.

60. The multiple objectives of the law strongly influence the Commissioners when deciding on a case. The arguments and contradictions between the choice of efficiency, consumer welfare, public interest and providing equal business opportunities for large, medium, and small-scale business actors is best reflected in the decisions of the Commission in the early years, such as the Indomaret case. In that case the Commission found that the reported party did not observe the principle of balancing economic democracy in promoting healthy competition between the interests of business and the interest of small-scale retailers, public interest and welfare. Some argue that the decision was also based on the constitutional provision relating to the “Economy Pancasila” which provides special protection for co-operatives and small-and-medium scale enterprises. Since the Indomaret decision, the KPPU has made no explicit reference to Articles 2 and 3 in subsequent decisions.

### **1.5 Process of Competition Law Drafting**

61. Prior to Law No.5/1999, legal provisions touching on competition could be found scattered throughout numerous other laws, including Indonesia’s criminal and civil codes; e.g. Law No. 5/1992 for Co-operatives, Law No. 9/1995 for Small Medium Businesses and Law No. 8/1999 for Consumer Protection. Article 52(1) of Law No.5/1999 leaves in effect all of these laws and regulations concerning monopolistic practices and unfair business competition, as long as they are not contradictory to Law No.5/1999 and are not superseded by any new laws. Private actions, however, may still be brought under pre-existing laws that touch upon competition. Examples of pre-existing laws with a bearing on competition include:

- a) Articles 382 bis, Criminal Law, states that “...anyone who, obtaining, executing or expanding a business for their own company or for another person’s company, engages in unfair business practices or deceives the public or a party, shall be punished because of the unfair business practices with a penalty of a maximum of one year four months...”
- b) Article 1365 of the Civil Code states that “every act that is proven to be against the law and causes loss to another person, that person shall be liable to pay compensation to remedy the loss.”
- c) Law No. 5/1984, the Industry Law, states that “The government shall regulate, supervise and develop industry to: (1) ... (2) expand fair competition and avoid unfair competition practices (3) avoid a centralised economy and exploitation of industry by a few actors or only one business actor in the form of monopolistic practices.” Article 9.2 of the Regulation and Supervision of Industry states that it shall be implemented with a view to: “(2) Creating a fair business atmosphere for industrial growth and avoiding unfair business practices between companies in the same industry, to avoid and prevent the centralisation of economic power by one or few companies or business actors in the form of monopolistic practices.”
- d) Law No. 1/1995, the Corporate Law, regulates some aspects of mergers, acquisitions and consolidations. It is clearly stated in the Elucidation to Law No. 1/1995 of the General Provisions: “To avoid unfair business practices caused by the centralisation of economic power in the hands of a few business actors or a few companies, the law concluded that the prerequisites for mergers, acquisitions and consolidations shall be implemented thoroughly to prevent and avoid monopoly and monopsony in every form which is injurious to the public.” The same concerns can be seen at Article 104.1 (b) which says that legal actions on consolidations, acquisitions and mergers shall also take into consideration the public interest and need and fair business.

62. The original idea for an Indonesian antitrust law dates back to the early 1990s, when the government, political parties and private organisations prepared draft laws. At one point, as many as seven different draft formulations in circulation were being discussed. Law No.5/1999 itself was written in part to satisfy the conditions of a Letter of Intent entered into between the government of Indonesia and the IMF, signed in July 1998 and also to address public concerns regarding monopolistic practices and closely related concerns about corruption, collusion and nepotism which arose during the “New Order” regime under former Indonesian President Suharto.

63. In a practice that had rarely been invoked, the House of Representatives (“DPR”) exercised its right of “initiative” to propose the draft law -- rather than relying on the government to do so. The process took only three and half months and a Draft was officially issued on October 18, 1998 by the DPR. Law No.5/1999 was passed by the Indonesian House of Representatives on February 18, 1999 and was signed into law by Indonesian President B. J. Habibie on March 5, 1999 and announced in the State’s Gazette No 33, 1999. Law No.5/1999's effective date was March 5, 2000 incorporating a transitional period of one year for the dissemination and socialisation of the law. Businesses were given an additional six-month grace period - until September 5, 2000 – to comply with or adapt to the newly enacted law.

64. The motivation of the DPR in proposing and passing Law No.5/1999 has been commented upon by various scholars. There seems to be agreement that the primary motivation was to bring the large conglomerates under control because cronies of Suharto headed them and because they were viewed as having been responsible for the economic crisis in 1997. Some have criticised Law No.5/1999 as having simply transplanted the approaches of other countries pointing out that it is essential that laws be consistent with a country’s legal system. Indonesia, however, singled out and adopted best practice from other countries as discussed later on.

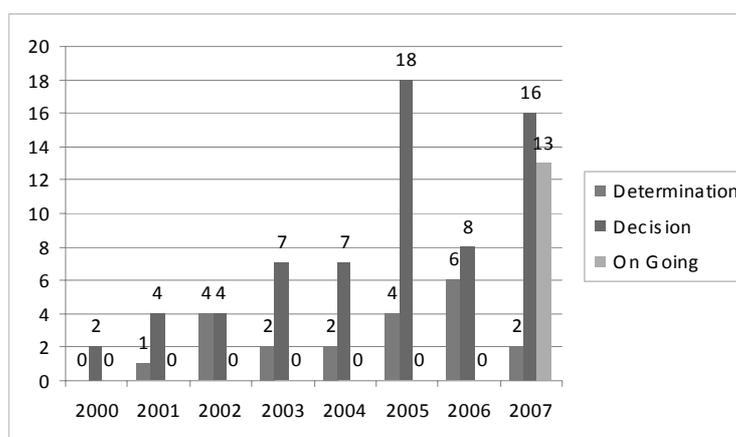
## 2. Scope and Application of Competition Law and Policy

### 2.1. Introduction

65. Since the enactment of the Law No.5/1999, **Komisi Pengawas Persaingan Usaha** (Commission for Supervision of Business Competition, herein referred as “KPPU”) has been the body responsible for enforcing the law in Indonesia.

66. In eight years of operation, KPPU has received an increasing number of complaints, from 7 to 231, and accordingly has rendered an increasing number of decisions from 2 to 46 rendered in 2000 and 2008 respectively. Graph 1 shows such evolution on KPPU’s work:

**Graph 1: Evolution of Competition Cases**



Source: KPPU 2007 Annual Report

67. The close relationship between anti-corruption and competition policies is evidenced by the fact that the majority of competition cases are associated with government tenders. The success of the KPPU in developing a competition culture in Indonesia is illustrated by the high percentage of KPPU recommendations adopted by the Government: 50% of the 57 recommendations issued over 2000-2008.

**Table 1: Effective rate of Advice and Recommendation - Year 2001-2008**

	2001	2002	2003	2004	2005	2006	2007	2008
<b>Effective</b>	2	1	7	0	4	1	8	5
<b>In-effective</b>	2	1	3	3	8	4	3	5
<b>Effective Rate</b>	50%	50%	70%	0%	33%	20%	73%	50%

Source: KPPU

## 2.2 *Elements of the Indonesian Competition Law*

68. Law No.5/1999 contains 11 Chapters and 53 Articles, with the major substantive law sections consisting of General Provisions, Prohibited Agreements, Prohibited Activities, Abuse of Dominant Position, The Supervision of Business Competition and District Court and Case Handling Procedure, Sanctions & Penalties and Exemptions.

69. As is common in civil law systems like Indonesia's, the first part of the law provides General Provisions including the definition of terms used in the law, which are to be referred to at all times when construing the purpose or meaning of the articles of the law and also relate to other existing law that regulate the same meaning. The following are the terms as defined in Law No.5/1999:

- a. *"Monopoly shall be the control of the production and/or marketing of goods and/or utilisation of certain services by one business actor or by one group of business actors.*
- b. *Monopolistic practices shall be the concentration of economic power by one or more business actors, resulting in the control of the production and/or marketing of certain goods and/or services resulting in unhealthy business competition and could be harmful to the public interests.*
- c. *Concentration of economic power shall be the actual control of a relevant market by one or more business actors, so that they are able to determine the prices of goods and/or services.*
- d. *Dominant position shall be a situation in which a business actor has not any significant competitor in the relevant market in relation to the market share controlled, or a business actor has the highest position among its competitors in the relevant market in relation to financial capacity, access capacity to supplies or sales, and the ability to influence supply or demand of certain goods or services.*
- e. *Business actor shall be any individual or business entity, either incorporated or not incorporated as a legal entity, established and domiciled in or conducting activities in the jurisdiction of the Republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the economic sector.*
- f. *Unfair business competition shall be competition between business actors in undertaking production activities and/or marketing of goods and/or services in a dishonest or illegal fashion or restricting business competition.*
- g. *Agreement shall be an action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not.*

- h. **Collaboration or business conspiracy** shall be the form of co-operation conducted by business actors with other business actors, with the intent to control the relevant market in the interest of the conspiring business actors.*
- i. **Market** shall be the economic institution where buyers and seller are directly or indirectly able to conduct trade transaction of goods and/or services.*
- j. **Relevant Market** shall be the market related to a certain marketing range or area by a business actor for the same or similar type of goods and/or services or substitutes of such goods and or services.*
- k. **Market structure** shall be the market condition that provides an indication of aspects that have significant influence on business actor's behaviour and market performance, among others the number of sellers and buyers, barriers to enter and exit the market, product variety, distribution systems and control of market shares.*
- l. **Market behaviour** shall be acts undertaken by business actors in their capacities as suppliers or buyers of goods and/or services in order to reach the company's objectives, among other achievement of profits, growth of assets, sales targets and the competition method used.*
- m. **Market Share** shall be the percentage of the sales purchase value of certain goods or services controlled by the business actor in the relevant market in a certain calendar year.*
- n. **Market Price** shall be the price paid in a transaction of goods and/or services in accordance with the agreement between the parties in the relevant market.*
- o. **Consumer** shall be any person who uses and/or utilises goods and/or services, whether in his/her own interests or the interests of others.*
- p. **Goods** shall be any object, either tangible or intangible, either movable or immovable, which can be traded, used, utilised or made use of by consumers or business actors.*
- q. **Service** shall be any assistance in the form of work or performance traded in society to be utilised by consumers or business actors.*
- r. **Business Competition Supervisory Commission** shall be the Commission formed to supervise business actors in conducting their business activities so that they do not conduct monopolistic practices and/or unhealthy business competition.*
- s. **The District Court** shall be the court referred to in laws and regulations existing in the legal domicile of the business actor."*

### **2.3 The Goals of Competition Policy and Development**

70. As mentioned, Law n.5 established as its purposes: "a. to safeguard the interests of the public and to improve national economic efficiency as one of the efforts to improve the people's welfare; b. to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large-, middle- as well as small-scale business actors in Indonesia; c. to prevent monopolistic practices and or unfair business competition that may be committed by business actors; and d. the creation of effectiveness and efficiency in business activities"<sup>3</sup>. The preamble also adds the promotion of economic growth. It is interesting to note that the Law established total welfare, instead of consumer welfare as its objective, as can be understood by the emphasis on efficiency and effectiveness of business activities.

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<sup>3</sup> Version in English of Article 3 of Law n. 5, provided by KPPU. Emphasis added.

71. There are many conflicting objectives in the Law: public interest, small business protection, efficiency, etc. Balancing such objectives would be challenging, and different balances may result in inconsistent and unpredictable decisions. The evolving application of the Law, within the legal culture and framework, economic environment and society's characteristics, will shape and define its balance. One dimension of this balancing has already been defined: According to commissioners, the prohibition of unfair competition has consistently been applied to practices that lessen competition, result in consumer losses or harm the public interest.

## 2.4 *The Scope of Competition Law*

### 2.4.1 *Anticompetitive Practices*

- Substantive Analysis Issues

72. As already noticed, Law n. 5 begins with a section in which concepts are defined. Some definitions are too restrictive or too broad. For example, the Law establishes the value of sales or purchases as the criterion to assess market share. However, other criteria such as quantity or capacity might better indicate competitive significance and are commonly used in other jurisdictions. Other concepts are defined more broadly than is common. For example, the Law definition of "monopoly" as either "one business actor" or "one group of business actors." Indonesian law provides little flexibility in application once terms are defined in law, and the competition law is difficult to alter.

73. Anticompetitive practices are divided in three main types: (i) prohibited agreements, subdivided into oligopoly, price fixing, territorial division, boycott, cartels, trusts, oligopsony, vertical integration, closed agreements and agreements with foreign parties; (ii) prohibited activities, subdivided into monopoly, monopsony, market control and conspiracy; (iii) dominant position, subdivided into general provisions, multiple positions, and share ownership.

74. Chapter III establishes market share-based threshold that establish legal presumptions. These presumptions are used to screen for the market structure that allow for the occurrence of monopolistic practices and or unfair business competition:

- For oligopoly/oligopsony: if two or three "business actors" control over 75% of the market (article 4(2));
- For monopoly, monopsony: if one "business actor" control over 50% of the market (Articles 17(2)C and 18 (2)); and
- For dominant position: if one "business actors" control over 50% or if two or three "business actors" control over 75% for a group of firms (article 25(2)).

75. Indonesia reverses the common pattern of rule of reason and *per se* illegal treatment. Unusually, it uses a rule of reason to evaluate some horizontal agreements typically assessed under a *per se* rule in other jurisdictions, such as price-fixing, market division, and bid rigging. But it treats much unilateral conduct as *per se* illegal, including price discrimination, exclusive dealing, tying and abuse of dominant position. This would seem contrary to the objectives of the law, not least by its chilling effect on the competition strategies of firms.

76. One way to deal with legal provisions that do not support the objectives of the law is to decline to enforce them. This is a whiff of this with respect to certain provisions here. For example, price discrimination is illegal *per se*. But in eight years, the KPPU has brought no case of price discrimination. Predatory pricing has been treated similarly. In many cases, price discrimination may generate pro-competitive effects and low prices may be misidentified as predatory. Thus assessment under a rule of reason would be more appropriate.

77. Government tenders conspiracy of all sorts (horizontal, vertical and both), mostly related to corruption of public officials, is one of the most successful areas of enforcement by KPPU. Most KPPU cases involve public procurement frauds. At first glance, having authority over certain corruption cases could appear to threaten the focus on competition issues. But that has not been the experience: Almost 90% of the cases caught under such provision were tender frauds and conspiracies.

78. The Anti-Corruption Act of 2002 applies only to State Officials, and to State Company officials involved in public procurement frauds. This law does not apply to private companies or business actors. The need to combat corruption involving private companies and actors prompted the coverage in the competition law. The institution enforcing the Anti-Corruption Act is the Corruption Eradication Commission (“KPK”).

79. KPPU and KPK signed a memorandum of understanding with the aim of enforcing both laws and to combat corruption and bid rigging or tender frauds by business actors. The agencies refer cases to each other, reinforcing the fight against corruption and anti-competitive practices simultaneously. Enforcement of both laws is aided by information about the illegal practices which mainly comes from tender “losers.” The relationship between the two Commissions seems to be very productive. The only guideline that has been issued by KPPU refers to Article 22 of Law n. 5, which relates to the Prohibition of Conspiracy in Tenders.

80. Another strategy of the corruption combat was the creation of an “integrity index”. The index is based on surveys about the bribe payments. Surprisingly, three district court judges were mentioned in the surveys.

81. Information about the illegal practices comes mainly from tender “losers”, who may submit complaints to both Commissions. Bid-rigging cases are more difficult to uncover, as there are no losers to complain. Even if KPPU can use wiretapping (article 12) and search and seizure procedures, getting the first bit of information is more difficult for the KPPU. Competition Law n. 5 does not provide for leniency agreements or amnesties. There are, however, incentives for whistle-blowing about corruption: first, there is a law on witness protection, provided to help the KPK, second, there is a provision for rewarding complaints up to 0,2% of the value collected by the State.

82. There is a special Court for corruption cases presented by the KPK. When, however, corruption cases are presented by the Public Prosecutor Office, they go to the District Court. The result is two separate procedures, two separate authorities, and the real potential for double standards. According to KPPU, the design of the enforcement of the Law is part of the problem, not part of the solution.

83. As already said, KPPU has no power to sign leniency agreements or apply amnesty programmes. Nevertheless, there are consent agreements by which the party “promises” stop the wrongdoing. Using a consent agreement can form part of a learning process that recognises the long tradition of monopolistic actions and nepotism through vertical chains.

84. According to KPPU’s, the analysis applied to anticompetitive practices will form part of a Guideline. The KPPU reported to be elaborating a Guideline that would contain all applied concepts, definitions and standards of analysis. These will aid transparency and, provided the judiciary is in accordance, aid legal security.

85. In 2007, KPPU judged an important case, which shows the kind of analysis it may render, as well as the impact of the judicial review over the Commission's decision. It was one of the cases to use economic analysis and on which the judicial review had a significant effect.

**Table 2: The Telecom Case – 07/KPPU-L/2007****i. History of the case**

After having received a complaint on 5 April 2007, the KPPU's secretariat conducted a preliminary investigation from 9 April to 22 May 2007. The Temasek Group of companies was investigated for infringement of article 27 and PT Telekomunikasi Seluler for infringement of articles 71 and 25.1.b of Law n. 5, respectively.

The Preliminary Investigation concluded that there was a strong indication that infringements had taken place, which gave the basis for a full investigation, hence further investigations were undertaken and completed on 27 September 2007.

The findings of the investigations confirmed the following suspected infringements<sup>4</sup>:

- “1. Temasek Holdings Pte. Ltd (hereinafter referred to as Temasek) owns majority of shares in two business activities of the same fields and relevant market that violates Article 27(a) of the Law No.5 of 1999;*
- 2. PT. Telekomunikasi Selular (hereinafter referred to as Telkomsel) remains the airtime tariff high that violates Article 17 (1) of the Law No.5 of 1999;*
- 3. Telkomsel abuses its dominant position (sic) to restrain market and the development of technology that violates Article 25 paragraph 1.b of the Law No.5/1999.”*

**ii. The Analysis by the Secretariat**

The Secretariat defined the relevant market as cellular telecommunication services in Indonesia (herein referred as the “Relevant Market”)

At the time of the analysis, the cell phone market was composed of six firms: Telkomsel, Indosat, Excelkomindo, Mobile-8, Sampoerna Telekomunikasi Indonesia, and Natrindo Telepon Seluler, with Telkomsel being the market leader.

Until 2006, telecommunication services' prices had been controlled by the Government through regulations that established a maximum price for telecommunication services in Indonesia. According to the report, the operators determined their prices on the basis of a formula contained in the most current “Decree of the Minister of Tourism, Post and Telecommunication No. 27/PR.301/MPPT-98 on Connection Service Tariff of Cell Mobile Phone” (herein referred to as Ministerial Decree 27/98), and the “Decree of Ministry of Transportation No. 79/98 on Service Tariff of Prepaid Cell Mobile Phone (hereinafter referred to as Ministerial Decree 79/98)”.

From 2006, the regulation of the Minister of Communication and Information No.12/Per/M.Kominfo/02/2006 on the Procedures of Tariff Fixing Conversion for Basic Telephony Cellular Mobile Network replaced the 1998 Decrees and established as a criterion that “[T]he tariff conversion calculating formula is performed by applying floor price”. According to the Secretariat, “the substance of tariff regulation in the provision does not reenact ceiling price but interconnection tariff as a floor price”. However, the investigation report mentions that the accepted prevailing tariff system is as to the 1998 Decrees<sup>5</sup>.

Temasek is an investment group with diversified portfolio, but with strong participation in Indonesia telecommunication markets through a number of companies. Through its subsidiary Singapore Telcom Mobile Pte. Ltd., Temasek holds 35% of Telkomsel's (the lead cellular operator) capital, Temasek also holds 41,9% of the capital of Indosat, the second largest company in terms of market share in the Indonesian cellular telecommunication market. After an extensive analysis over the definition of majority shares and control, the Secretariat concluded that Temasek had control over Telkomsel and Indosat, and that for the purposes of the analysis, they could be considered as “one single entity”.

<sup>4</sup> Decision of the case 07/KPPU-L/2007 (herein referred as “Decision”), pg. 5.

<sup>5</sup> Decision, pg. 22, item 55.

The analysis was based on the effects of the cross-ownership of Temasek. According to the KPPU secretariat, such effect was demonstrated by the changes in the industry concentration ratio before and after the cross ownership. *“If the level of industrial structure is getting concentrated after cross-ownership, it indicates that the conduct of cross-ownership gives negative impact to competition”*<sup>6</sup>. Such negative impact would represent consumer loss. The analysis assumes that the market concentration indicates market power and the increase of it provides easier opportunity for tariff fixing. The Secretariat established four factors to be observed in deciding whether or not an abuse of market power is occurring: *“i. its high selling price product; ii. its relativity with substitution product; iii. its relativity with production costs; iv. its high profit margin gained by business actor in the relevant market.”*<sup>7</sup>

As per the 2006 report, Telkomsel (68.08%) and Indosat (21.55%) had a combined market share of 89.63% of the Relevant Market.

The decision describes the theory of oligopoly as presented in Pyndick and Rubinfeld, 2005<sup>8</sup>. The Secretariat arrived at the conclusion that companies are likely to co-operate, especially through interconnection agreements, and then collusion is more likely to happen.

The investigators calculated the HHI (Herfindahl-Hirschman Index) and GHHI (General Herfindahl-Hirschman Index)<sup>9</sup> and concluded that the industry was “very concentrated”, that it had remained so and followed a trend towards more concentration every year during the period 2002 to 2006..

Two criteria were used to measure competition in the market; the development of the network as measured by the Base Transceiver Stations (BTS), and prices. For the first step, the investigations found that *“The low aggressiveness of the closest competitor will give a chance to dominant actors to optimise their market power.”*<sup>10</sup> With respect to prices, it was found that in general there was a price leadership strategy in the market, led by Telkomsel group.

By balancing high concentration and market ownership, the Secretariat concluded that Telkomsel and Indosat increased market share in the period of cross-ownership by comparing their average market shares between 2003 and 2006 (the cross-ownership period) to the market shares of 2002, 89.61% and 83.58%, respectively. The same effect was obtained using the HHI and GHHI measurements. In 2002, the HHI was 4312 and the average HHI during the cross-ownership period was 4823.73. KPPU found that this index was above the 3000 considered by the USDOJ and USFTC guidelines to cause “limitation on competition”<sup>11</sup>.

The Secretariat conducted an analysis of the demand function to estimate profit in different conditions of competition, but not specifically for Indonesia. It found that Telkomsel was the first mover because it was the incumbent, had dominant position and had built wide infrastructure. For a more competitive market, the investigators understood that non-first movers should be more aggressive. The Secretariat did not observe such movement from Indosat, the second player, which reinforced the power of Telkomsel in the market. Investigation found that the cross-ownership had weakened the ability of Indosat to act as a threat to Telkomsel, and thus there was no competition in the Relevant Market. As per summarised in the investigation report: *“The high market power, assumed to be caused by concentrated structure as a result of cross-ownership, can be described by several indications such as high profit margin measured by EBITDA, high selling price compare to other countries, and the high differences between selling price and production cost.”*<sup>12</sup>

<sup>6</sup> Decision, pg. 92, item 195.

<sup>7</sup> IDEM, item 197.

<sup>8</sup> Robert S. Pindyck and Rubinfeld, *Microeconomics Sixth Edition*, Prentice Hall, New Jersey (2005), page 442-463.

<sup>9</sup> GHHI was adopted to incorporate cross-ownership in the concentration index. In order to consider the cross-ownership effect to market power, the Modified Herfindahl-Hirschman Index has been adopted elsewhere. See OECD DAF/COMP/WP3(2008)1 on minority shareholding.

<sup>10</sup> Decision, pg. 102.

<sup>11</sup> Decision, pg 109, item 112.

<sup>12</sup> Decision, pg. 1212, item 154.

For tariff analysis, the Secretariat applied the t-Statistic test to the prepaid average tariff changes in the period 2002 to 2006 and compared prices of services with prices obtaining in other countries and the ASEAN community. It concluded that the tariffs are higher than “*the amount of interconnection recommendation*”.

The last part of the analysis consisted in assessing the consumer losses by estimating price-elasticity of the demand, further compared to prices in other countries and quantities recommended by OVUM<sup>13</sup>. The elasticity of the demand estimation was based on a dataset of observed market prices and quantities. There is no discussion on identification problems – this is a very common difficulty in demand function estimation – and how these were overcome.

Under the Secretariat assessment, consumer losses amount to IDR 11.9 trillion annually (when compared to Public Switch Telephone Network interconnection prices) and IDR 76.8 trillion (when compared to the price of interconnection).

The Secretariat estimated the market variables without the ownership and inferred that the cross-ownership had negatively impacted the competition in the market, by weakening the incentive of the second competitor to compete with the leader and thus strengthening the market concentration. Under different circumstances, competition would lower prices, increase consumer surplus and reduce consumer losses, according to the Report.

#### **ii.i. The Secretariat’s Conclusions:**

The Secretariat concluded that:

- i. Temasek controlled Telkomset and Indosat through indirect participations (cross-ownership);
- ii. Cross-ownership created high concentration and market power and reduced competition;
- iii. The cross-ownership by Temasek violated Article 27a of Law n. 5/1999;
- iv. The tariff fixed by Telkomsel was excessive;
- v. “*The use of market power by Telkomsel, decreasing competition and creating excessive pricing in cellular telecommunication service in Indonesia violates Article 17 paragraph (1) and Article 25 paragraph (1) of the Law No.5/1999*”.

Examiner Dr. Ir. Benny Pasaribu disagreed with the investigation report conclusions for lack of evidence.

#### **iii. The Commission’s Decision**

On November 19, 2007, the Commission concurred with the secretariat's findings, according to the analysis described below:

- i. of article 27 by Temasek, Singapore Technologies Telemedia Pte. Ltd., STT Communications Ltd., Asia Mobile Holding Company Pte. Ltd, Asia Mobile Holdings Pte. Ltd., Indonesia Communication Limited, Indonesia Communication Pte. Ltd., Singapore Telecommunications Ltd., and Singapore Telecom Mobile Pte. Ltd (collectively referred as “Defendants”;
- ii. of article 17 by Telkomsel;
- iii. of article 25(1)(b) by Telkomsel;

As remedies and penalties for the infringements found, the Commission:

- i. Ordered the Defendants to sell their participation either in Telkomsel or in Indosat, within two years of the decision;
- ii. Ordered the Defendants to release voting rights and rights to nominate directors and commissioners in either Telkomsel or Indosat, up until the sale of the shares mentioned in the prior item;
- iii. The mentioned participation should be sold following two conditions:
  - a. Each buyer shall be limited to acquire a maximum of 5% of the total divested shares; and
  - b. The buyer may not be associated to Tomasek and or other buyers in any form.

<sup>13</sup>

Although it is used as a standard, there is no explanation in the report on the meaning of the term.

- iv. Applied a fine of Rp 25,000,000,000 (twenty-five billion) to the Defendants;
- v. Ordered Telkomset to cease practicing “high tariff” pricing and decrease the tariff on the day of the decision by at least 15% (fifteen percent);
- vi. Applied a fine of Rp 25,000,000,000 (twenty-five billion) to Telkomsel;

**iv. The Commission’s Analysis**

The Commission rebutted the parties’ allegation with respect to (i) KPPU jurisdiction; and (ii) due process.

The Commission asserted its jurisdiction by considering companies that are not domiciled in Indonesia as part of the Temasek group, applying the single entity and effect doctrines, following the extraterritoriality principle – an interpretation affirmed by the Indonesian Supreme Court.

Among the procedural allegations made by the parties, Defendants argued that Commission had compromised the independence of the investigation process by disclosing the decision to the media. Another interesting procedural challenge refers to the time limit for the issuance of the Investigative report. None of the procedural allegations were sustained.

On the merits, Commission considered the following:

The Commission defined the relevant market as the cellular telecommunication services in Indonesia, aligned to the Secretariat’s findings.

Commission stated that Law n. 5 adopted both a rule of reason and per se analysis. According to the Commission, conducts “with the sentences “causes monopoly practice”, and/or “unfair business competition” are classified to be analysed by the rule of reason”. All the other conducts should be reviewed under the per se rule. Nonetheless, it decided for a rule of reason analysis, under which the authority should demonstrate the negative impact of the conduct over the market and consumers.

Regarding to the analysis of the infringement, the Commission agreed with the Secretariat’s findings that the share ownerships within the Temasek group configured the infraction. The Commission also agreed with the investigation report that the participation and the terms of such share ownership gave Temasek control over Indosat and Telkomsel, based on capital participation, management and influence over decision-making. KPPU understood “[T]he fundamental meaning of Article 27 is to prohibit business actor controls some competing companies in the market. The control exists through majority shareholder in both companies. If it happens, de jure, it is a control. The significant share ownership in both companies is de facto able to control management decisions’ of the company.”<sup>14</sup>

Once the first requirement had been identified, the Commission evaluated the market in order to assess market shares and the behaviour. The Commission adopted the market share assessment used by the Secretariat and moved to the analysis of the effects on competition caused by the Temasek Group having control over 50% or more of the market.

The first behaviour analysed by the Commission refers to Indosat efforts, as the second player in the market, to develop the network by building the Base Transceiver Stations (BTS). The Commission concluded that “*the aggressiveness of Indosat*” was lower than that of other competitors due to the conflict of interest of its controller Singapore Technologies Telemedia (herein referred as “STT”), which is controlled by Temasek. The Commission evaluated the impact of Indosat’s lower than expected engagement based on five criteria: “(i) *competition in cellular industry*, (ii) *price leadership*, (iii) *price level*, (iv) *profit rate*, and (v) *consumer loss*”<sup>15</sup>.

It concluded that Indosat, as the closer competitor, had the capacity to oppose the dominant player and that Indosat’s under-development strengthened the dominant position of the leader, Telkomsel, in agreement with the findings of the Investigation team.

<sup>14</sup> Decision, pg. 634, item 5.5.2.4.

<sup>15</sup> Decision, page 641, item 5.5.5.1.

To support such a conclusion, the Commission found that the market was not competitive. Prices were found to be fixed, having presented minimum fluctuation over the years, which was read by the authority as an evidence of non-competition. The Commission recognised that the price in the Relevant Market was established under a price leadership conduct which was seen as an indicator of lack of competition. It rebutted the idea that price leadership could be a sign of competition by understanding that when prices are not related to costs and the market was found not to be competitive, price leadership indicates market power and lack of price strategies from the other competitors.

Evidence presented to strengthen the market power argument was that Telkomsel, the leader, hadn't employed any price strategy to enhance competition and avoid any threat from its competitors. The Commission concluded: *"Therefore, it is proven that Telkomsel is only decrease competitive pressure and does not try to create competition in the market."*<sup>16</sup>

However, in the price leadership model, the leader sets prices and quantities where the marginal revenue equals marginal cost, considering the residual demand. The followers are price takers and will set quantities where the price (constant marginal revenue) is equal to the marginal cost. Therefore, even in price-leadership models, costs are taken into account and the extent of the leader's market power will depend on the number of followers and the elasticity of the followers supply. The leader does not need to adopt a "cross-ownership" strategy to achieve this result. On the contrary, the profit maximising behaviour of independent firms is enough to conduct to the mentioned equilibrium. Cross-ownership could facilitate collusive behaviour among rivals, but this was not the reasoning of the Commission decision.

With respect to the conduct of imposing excessive prices, the Commission followed the opinion of the Investigation report that the excessive price is based on the demonstrated high profit rate of the cellular operators. The profit rate is calculated according to the EBITD margin and is defined as *"a price higher than its predicted competitive price, or higher significantly than its cost."*<sup>17</sup>

The Commission also rebutted the argument that the price could not be excessive once it is limited by price cap regulation, by stating that the maximum price established by regulation does not restrain the parties to lower prices through market mechanisms. The conclusion on excessiveness price was also affirmed by the finding of the Secretariat and the Commission that Indonesian prices, profitability rates and EBITDA margins were higher than in other jurisdictions, including other Asian countries.

The next step was to assess consumer losses. Commission also followed and used the investigative analysis and calculation, as to be the difference between the price paid by consumer and the producer's value (cost plus profit). Under this assessment, Commission estimated consumer losses as amounting to between RP 14,7 trillion rupiahs and Rp 30,8 trillion rupiahs in the four years of conduct (2003 to 2006). According to the Commission *"[T]he calculation has considered the balance interest of business actor and consumer"*<sup>18</sup>.

By having configured the infringement, as well as the negative impact of the conduct in competition and in consumers, the Commission decided to condemn the parties and applied the mentioned penalties and remedies.

The Commission dismissed possible infringement of the second part of Article 25(1)(b) of Law n. 5, that refers to limitation to technology development due to lack of evidence. The Commission understood that Telkomsel developed and introduced new technologies in the market and that the anticompetitive behaviour under analysis created barriers to the development of the market and not to the development of technology.

An interesting point posed by the Commission and the Secretariat was the use of international doctrines and UNCTAD's model and decisions from other jurisdictions. This practice strengthens the decision and makes it more robust.

<sup>16</sup> Decision, page 646.

<sup>17</sup> Decision, pg. 653, item 5.5.5.1.15.

<sup>18</sup> Decision, pg. 659, item 5.5.5.6.4.

#### v. The Judicial Review

A KPPU's Commissioner reported that the parties appealed against the Commission's decision to the judiciary. The Supreme Court changed the Commission's remedy allowing the parties to sell the mentioned participations to any buyer, disregarding the limitation that buyer could not have any relation to the sellers.

The Decision was carefully justified and the Commission's findings and conclusions were well disclosed in the Decision. However, to better reap the benefits from the educational purposes of a decision like this, the Commission should maintain the Secretariat report, parties' defences and the Decision itself separate.

The case's description suggests that if merger control was implemented in Indonesia, this case would be the subject of a merger review and would probably have been approved with strong restrictions or would have been blocked. It seems that the acquisition of Temasek's indirect participations in the lead and second player in the Indonesian cellular market would not have been permitted.

86. KPPU is reported to be elaborating several Guidelines at the same time, including merger guidelines. Only one guideline has been adopted and used. Guidelines are often written on the basis of case experience and usually reflect judicial decisions. Writing guidelines, including the process of reaching internal consensus, can be difficult and time-consuming. For these reasons, guidelines of more limited scope may be more desirable.

87. As Guidelines affect different stakeholders with different perspectives and experiences, it is quite useful to open the proposal to public consultation. Translation into English might attract international commentary that would provide yet further perspectives and experiences.

- Procedural Issues

88. Under articles 35 and 36, KPPU has broad powers, authority and obligations that require and allow KPPU to proceed with investigations and adjudicate competition cases. Among these obligations, KPPU has to "evaluate" agreements, business activities and actions of "business actors" and abuse of dominant position. It is also obliged to provide advice and opinions concerning governmental policies, to prepare guidelines and submit annual reports.

89. Among the powers, KPPU has the authority to receive complaints, summon parties and witnesses, make conclusions from investigations and hearings, request statements from related governmental institutions, "*determine and stipulate the existence or non-existence of losses on the parts of business actors or society*", and impose sanctions. The investigative powers are disposed in broad wording such as "*conduct research*", "*conduct investigations*", "*obtain, examine and/or evaluate*" letters, documents or others instruments of evidence.

90. An investigative procedure is initiated by either a complaint from any person or a KPPU *ex-officio* measure. The KPPU *ex-officio* measure is a result of a monitoring process carried out within 90 days, extendable for a further 60 days. Although anonymous complaints are not accepted, the identity of the whistleblower can be treated as confidential.

91. The complaint to the Commission shall be in writing and must identify the alleged violation. Article 38(4) requires that the Commission establish specific procedural rules for complaints.

92. Once accepted as a competition case, the complaint must follow every step of the case procedures. Most of the decisions made by KPPU, including condemnations, have a small impact on the economy, according to Commissioners. The KPPU is not allowed to choose cases, prioritise, dismiss or fast track any case .

93. If the complaint or monitoring process is sufficient to conclude that there is a possible infraction, KPPU initiates a preliminary investigation. The purpose of a preliminary investigation is to collect early evidence of an anticompetitive practice and determine whether further investigation is necessary. Hearings can be held during this phase. The preliminary investigation should be terminated within 30 business days.

94. If the preliminary investigation concludes there has been a possible infraction, the Commission initiates a Further Investigation that shall be carried out in 60 business days, extendable by the Commission for up to a further 30 days.

95. The parties may remain silent or lie in order not to implicate themselves but may not refuse to hand over any documents requested, refuse to testify or impede the investigation.

96. Reasoned decisions shall be rendered by the KPPU in writing, in open public sessions within 30 business days after the conclusion of the period of the further investigation. The parties have 30 days to comply with the decision.

97. The Law does not provide for any kind of revision by the KPPU. Factual and simple mistakes that may occur can only be corrected by costly and time-consuming appeal to the judiciary. Appeal against the KPPU's decisions should be forwarded to the district court within 14 days from notification of the party who has been found guilty. The District Court has 30 days to decide. Both KPPU and the parties may appeal the District Court decision directly to the Supreme Court, bypassing the High Court (Court of Appeals). The Supreme Court has 30 days to render a decision. The judiciary is also called upon by KPPU to enforce its decisions, in case of non-compliance.

98. According to KPPU, 70% of the cases have resulted in convictions. 40% of these 70% are appealed to the judiciary. 85% of the KPPU appealed decisions were confirmed in district courts, while the Supreme Court confirmed all decisions that reached it. This is considered a very good performance when compared to other young jurisdictions.

99. All the deadlines related to investigation and decision-making of anticompetitive practices are strict without provision for suspension for any reason. Even the period for the parties to comply with the decision may be too short, depending on what kind of remedies are imposed by the Commission. Some academics justify this provision based on the slow judiciary system. However, it is recognised that while the time limits may work for small and simple cases, they do not for more complex ones. From a commissioner assessment, it is very difficult to perform good economic studies within the time constraints established by the law.

100. Time restrictions make it difficult to perform a deep investigation and appropriate economic analysis. A system of suspension of the time limits in order to gather data or additional information, constrained by some rules such as justification or the length of suspensions, could address this problem. At present, the only source of flexibility is that the district court can stretch its deadline to render a decision when the court understands that the case needs to be referred back to KPPU to further investigation.

101. An amendment to the Law now under discussion would change procedures. Today, KPPU's decision can be appealed in any district court in Indonesia. There are more than one hundred district courts. The draft amendment provides that the Supreme Court appoints one district court to receive appeals of the KPPU decisions. Alternatively, some positive improvements could be observed if appeal were shifted from the district court to the High Court<sup>19</sup>.

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<sup>19</sup> There are three levels of Courts: District Courts, High Court and Supreme Court.

- Sanctions

102. According to Law n. 5, KPPU has the power to impose administrative and criminal sanctions. Among the administrative sanctions, the Commission can declare agreements to be null and void, order the ceasing of vertical integration or activities “*proven to been causing monopolistic practices, unfair business competition and/or being harmful to society*” and misuse of dominant position, stipulate compensation payments, and impose fines between one billion Rupiah and twenty-five billion Rupiah (approximately USD 82,650 to USD 2.07 million, at current market exchange rates).

103. Article 48 adds criminal sanctions to be imposed by the KPPU. Depending on the gravity of the offense, criminal penalties vary from one billion Rupiah to one hundred billion Rupiah (approximately USD 82,650 to USD 8,27 million) or imprisonment that ranges from three months to six months. The authority may also impose additional sanctions such as “*a. revocation of business licenses; or b. prohibition of business actors proven to have violated this law from filling the positions of director or commissioner for at least 2 (two) years and for no longer than 5 (five) years; or c. orders to stop certain activities or actions resulting in losses to other parties*”.

104. Notwithstanding, Commissioners reported that KPPU is not allowed to impose criminal sanctions. Therefore, it is not clear if KPPU has the power to apply criminal sanctions, and, if so, whether it can do so without police or judicial support. This creates legal insecurity and weakens the enforcement by KPPU.

105. The maximum fines are quite low to deter illegal practices, as compared to the largest Indonesian companies’ sales, such as Telekom Indonesia (US\$ 5.59 billion sales in 2008), Bank Rakyat Indonesia (US\$ 2.15 billion sales) or Bumi Resources (US\$ 1.87 billion sales).<sup>20</sup>

106. Higher fines should be included in the amendment to the law, and a simple system to review the threshold monetary values should be adopted.

- Merger Review

107. Merger review is an important role for Competition authorities in order to prevent the creation through merger and acquisitions of high market power or a market structure that ease co-ordinated market interaction. In addition, merger decisions are a means of raising the profile of a competition authority.

108. Although the Law provided for merger review, such provisions are still awaiting governmental regulation, as a condition for its application and validity. There is strong resistance from some government members. Although treated as a high priority within KPPU, KPPU’s initiatives in the last four or five years have had no result. However, while awaiting this regulation, KPPU is reported to have finalised a merger review guideline.

109. Merger review is resource consuming<sup>21</sup>. In jurisdictions that have merger review and control, merger review occupies a substantial part of the budget and staff. Due to limited staff resources, merger notification should initially, at least, be required only for transactions meeting a very high threshold. It is

<sup>20</sup> Forbes 2008 ( [www.forbes.com/lists/2008](http://www.forbes.com/lists/2008)). Figures in US\$ latest available.

<sup>21</sup> According to the study prepared under the Competition Policy and Implementation Working Group of the International Competition Network (CPI/ICN): “*In most of the cases, these “reactive” answers reflect the high number of merger reviews submitted to the authorities, which they considered as the principal element that restricts that agency’s ability to be proactive*”.

also very important that such thresholds could be flexible in order to be fast and easily adapted in case it is perceived that the threshold is too broad or too narrow.

110. A fair way to charge merger filing fees is to define different levels of filing fees, attached to the value of the transaction. The filing fees categorisation follows the idea that small transactions uses less resources to be analysed and thus make the system fairer. It is important that, like the thresholds, the filing fees levels were created by regulation or any other mechanism that allows KPPU to easy and fast change and adapt those values to the reality. This system is used by the United States and, in terms of developing countries, by South Africa.

111. Some scholars read the original, authentic language of Article 28 in Law n. 5, that is, Indonesian, as giving the KPPU complete freedom to interpret the Article as prohibiting all mergers and acquisitions regardless of effect. However, the purpose of reviewing mergers and acquisitions is to assess, case by case, the likely effect of the transaction on competition. Amendment of the Law could clarify that only mergers or acquisitions meeting a threshold for competition harm in Indonesia would be prohibited or subject to conditions for clearance.

112. Article 28 is an illustration of ambiguous drafting leading to uncertainty and harm of the business environment, in turn undermining the objectives of Law n. 5.

- Judicial Review

113. Any KPPU decision can be submitted to judicial review. According to the Indonesian legal system, KPPU's decisions must be appealed to the district court. Appeals of district court decisions shall be reviewed by the Supreme Court, bypassing the High Court, as mentioned above.

114. KPPU must appeal to a district court to enforce any KPPU decisions that are not voluntarily complied with. Hence, competition law enforcement involves both KPPU and the judiciary. Thus, the court system plays a major role in competition law and policy implementation and enforcement.

115. According to KPPU information, less than 0,3% of fines are voluntarily paid. Considering the total fines paid after Court execution, the percentage is extremely low as well: only 1,4%. A strong effort towards higher effectiveness of KPPU decision is urgently required.

**Table 3: Total Fines and Paid Fines – Year 2000-2008**

Year	Fines	Paid Fines	
	Total (US\$)	Voluntary (US\$)	After Court Execution (US\$)
2000	-	-	-
2001	-	-	-
2002	13.506.184	-	-
2003	599.129	-	-
2004	17.635.416	-	-
2005	11.082.172	-	1.143.802
2006	4.053.759	-	144.226
2007	78.289.270	423.752	423.752
2008	1.958.649	-	43.639

Source: KPPU

116. Most district court decisions involving the competition law are appealed to the Supreme Court. The district court judges are unfamiliar with competition matters and capacity building is needed. Only about 200 of 6000 district court judges have received training in competition law. Frequent high level workshops on law and economics for the Supreme Court would also be helpful.

117. KPPU asked the Supreme Court to issue procedural guidelines for competition law cases. Law n. 5 has inadequate procedural provisions and KPPU needs its role and competencies clarified. Many cases appealed to the Supreme Court referred to and challenged the KPPU's procedures<sup>22</sup>.

118. Following much discussion and research, the Supreme Court issued Perma No.1/2003 (*Peraturan Mahkamah Agung – Perma*), which is a clear instruction to the district court about how to treat an objection (*keberatan*) to a KPPU decision.

119. Beyond making the process transparent and stable, a positive effect was that the Supreme Court guideline instructed the District Court to remand the decision back to the Commission in case of lack of or incomplete evidence, giving a clear message that all the investigative competencies remained exclusively with the KPPU. Such a measure should strengthen recognition of KPPU technical expertise and independence. Moreover, the procedure established by the Supreme Court avoids that a technical decision made by the Commission and informed by the work of the Secretariat technical staff, would be replaced by a decision of a judge unfamiliar with competition issues.

120. The judiciary also faces tight time limits for rendering decisions imposed by Law n. 5. Although there is no legal sanction in the case of deadlines not observed, such non-observance would negatively affect the judges' performance evaluation and promotions.

121. Although to date, no case exceeded the prescribed deadline 30 days is an impossible time limit with which to comply, as 10,000 new lawsuits arrive each year (approximately 10 to 20 cases a day for each judge) and it is unlikely that the current deadlines can continue to be observed. The Law should be amended to extend the time limit to, for instance, 90 days for the Supreme Court to render a decision, as already suggested by members of the Supreme Court.

122. There is a proposal that appeals of KPPU decisions go directly to the High Level Court or to the Commercial Court. This would imply that fewer judges would have to be trained and that the capacity building process could be more effective.

123. While both KPPU and the Supreme Court understand that only questions of law (procedure) and not substance (the merits) should be brought to the Supreme Court, the Court recognises that judges need to deeply understand the merits and the methodology of economic analysis in order to properly perform their functions.

- Exemptions: article 50

124. The Indonesian Competition Law contains a number of exemptions that use broad or undefined concepts, making the provisions unclear. Some of the exemptions were included to address industrial and socio-economic policy goals such as promoting innovation and partially maintaining the *status quo*, such as state monopolies.

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<sup>22</sup> Appeals can also challenge the merits of the decision.

125. Article 50 lists the exemptions to the application of the Law:

- a. actions and or agreements intended to implement applicable laws and regulations; or*
- b. agreements related to intellectual property rights, such as licenses, patents, trademarks, copyright, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise; or*
- c. agreements for the stipulation of technical standards of goods and or services which do not inhibit, and or impede competition; or*
- d. agency agreements which do not stipulate the resupply of goods and or services at a price level lower than the contracted price; or*
- e. co-operation agreements in the field of research for the upgrading or improvement of the living standard of society at large; or*
- f. international agreements ratified by the Government of the Republic of Indonesia;*  
*or*
- g. export-oriented agreements and or actions not disrupting domestic needs and or supplies; or*
- h. business actors of the small-scale group; or*
- i. activities of co-operatives aimed specifically at serving their members.”*

126. The list of exemptions does not only refer to small business, as can be found in some other jurisdictions, but can be interpreted to also include a range of business sizes because of the imprecise wording.

127. One exemption that attracts particular attention is that on co-operatives. Exemption for co-operatives is a political issue. Although KPPU interprets the provision to mean that only co-operatives that provide services to their members are exempted, this limitation is not explicit in the Law. Neither does the Law bring any limitation related to the size of the co-operative. Such a broad exemption may inadvertently authorise anticompetitive effects, not least by offering the possibility of business to be structured in such a way as to bypass the competition law.

## **2.5. The Application of Competition Law**

### **2.5.1 Institutional**

128. **The Komisi Pengawas Persaingan Usaha** (Commission for Supervision of Business Competition, or KPPU) was established by the Decision of the President n. 75, of 8 July 1999 (Presidential Decree) and in line with Article 34 paragraph (1) of Law No. 5, as an independent and autonomous body. The process of forming the Commission was completed by the appointment of its members on 7 June 2000.

129. The KPPU is not part of the judicial, executive or legislative branches of Government. However, it is accountable to and monitored by all of them. Regarding the executive and legislative branches, as per article 35(G) the Commission is required to submit annual reports to the President and to the People's Legislative Assembly (DPR, the House of Representatives). Additionally, the President is responsible for the appointment and dismissal of the commissioners, subject to approval by the DPR. The DPR approves the KPPU's budget. All KPPU decisions may be appealed to the judiciary and compliance with KPPU's decisions is enforced through the courts. The public may also monitor KPPU activities since all of its decisions are rendered in public sessions. However, there is no requirement that the annual report be made publicly available.

130. Provisions in the law regarding the Commissioners, or in some instances the absence of such provisions, regarding dismissal, prolongation without reappointment, number of Commissioners, quorum,

and the holding of multiple jobs by Commissioners are sources of concern, particularly as regards political interference.

131. According to Law n. 5, dismissal of a Commissioner by the president does not require cause, however, Parliament must consent to the dismissal.<sup>23</sup>

132. The law specifies a minimum number of commissioners, 7, but not a maximum.<sup>24</sup> At present, 13 commissioners have been appointed. Of these, 11 are active. Commissioners are appointed for a five-year term, with one reappointment possible. Further, when the mandate of a commissioner expires and no replacement commissioner has been appointed, the existing mandate may be extended. Both the possibility of reappointment and of prolongation may affect commissioners' decisions and conversely their decisions can affect their prospects for reappointment or prolongation.

133. The minimum quorum for the Commission to make a decision is inconsistent with the number of members. Law n. 5 specifies that the quorum for decision is three members, but does not specify the maximum number of members. Three members are fewer than the majority of the minimum possible composition. A decision taken by three among seven or more members may be argued to lack legitimacy, and the argument is stronger the higher the number of commissioners.

134. Law n. 5 does not require the position of Commissioner to be an exclusive, full-time function. The Law does require, among other things, that the commissioners have some experience in business or have “*knowledge and expertise*” of law and economics.

135. Most of the current commissioners are professors of law or economics, such as the current Chairman and Vice Chairman. However, some Commissioners are leaders or members of political parties. Almost all the people interviewed associated with competition policy in Indonesia mention this as a problem and a vehicle for undermining the independence of the KPPU. They see some Commissioners as having too close a relationship with party politics.

136. Three main recommendations follow from the above discussion: a) to establish a maximum number of Commissioners, b) to strengthen the staff and Secretariat and c) to require that the Commissioners not hold political positions.

137. In addition, it is also desirable, in order to transfer expertise and to enhance legal certainty, rules on non- or delayed appointment should maintain staggered expirations of mandates for commissioners. For instance, if there are seven Commissioners, as in the draft amendment, replacement should occur at different times for two to three commissioners. This could be accomplished relatively easily by amending the terms only the one time, after which the expiration of subsequent mandates would not coincide.

138. The KPPU has a technical Secretariat that is responsible for carrying out the investigations. The Secretariat is staffed by the technical personnel and also draws on external experts who are co-opted into technical working groups as needs require. Two key challenges are recruitment and retention of personnel with requisite skills for competition enforcement.

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<sup>23</sup> Article 33 lists the hypothesis for the termination of membership as of: “a. demise; b. resignation upon own request; c. residing outside the territory of the State of the Republic of Indonesia; d. continuous physical or mental illness; e. expiration of term of membership in the Commission; or f. dismissal.

<sup>24</sup> The draft amendment to the Law defines seven as the maximum number of commissioners, according to Commissioners.

**Table 4: Development of Human Resources**

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Administrative Staff	7	10	14	35	36	35	29	96	135
Technical/Supporting Staff	0	1	10	11	13	13	22	22	33
Competition Policy Analyst	0	0	0	0	5	5	10	10	10
Investigator	0	14	14	17	18	23	18	18	16
Management	3	7	7	8	11	13	23	24	27
Commissioner	10	10	10	10	10	9	7	13	13
<b>TOTAL</b>	<b>20</b>	<b>42</b>	<b>55</b>	<b>81</b>	<b>93</b>	<b>98</b>	<b>109</b>	<b>183</b>	<b>234</b>

139. Turnover is high, as the technical quality of most of the staff is far above the market average and salaries are relatively low within the KPPU. This disparity of salaries may be worsened if a proposal to incorporate the technical staff into the civil service. Such a move would immediately decrease salaries by 60 percent. At present, the technical staff is not classified as civil servants. The proposal is seen as a positive one in Indonesia. The current economic crisis could reduce the immediate loss of trained technical staff, but probably not in the longer run. Similarly, recruitment in the future would probably be negatively affected.

140. KPPU resources basically originate from the governmental budget (“State and Revenue and Expenditure Budget”). The budget is linked to the Ministry of Trade<sup>25</sup>. Revenue from fines go to central government budget. The Law, however, left open the possibility that the Commission’s budget be supplemented by alternative sources. For instance, if merger review is adopted, it will be possible to charge notification fees that could at least partially cover the costs of the review. This approach is adopted by many jurisdictions and can help meet the costs of the competition authority.

141. The Secretariat prepares the KPPU's budget proposal based on an annual and a five-year programme. The budget proposal is then submitted to the Ministry of Trade and, as already mentioned, approved by the Parliament. Budgetary approval involves two major processes – negotiations with the Government and with the Parliament. The budget proposal is for 2 years, but it is approved on an annual basis. The evolution of the KPPU budget shows a significant increase over the last 4 years. During 2000-2004 the average budget was US\$ 5,53 million dollars, while during 2005-2009 it jumped to US\$ 16 million<sup>26</sup>.

**Table 5: Evolution of KPPU's Annual Budget**

Year	Total (US\$)
2000	2.154.611
2001	6.683.860
2002	4.840.716
2003	7.464.619
2004	6.510.987
2005	10.751.740
2006	19.432.676
2007	18.009.467
2008	17.152.943
2009	15.130.686

Source: KPPU (Conversion to US\$ based on implied Purchasing Power Parity conversion rate, as reported by IMF outlook, 2009).

<sup>25</sup> Although there could be a conflict between trade policies and competition, KPPU has not reported having any problem in this sense.

<sup>26</sup> Conversion to US\$ based on implied Purchasing Power Parity conversion rate, as reported by IMF outlook, 2009.

### 3. Competition Advocacy

142. Many of the anticompetitive practices that are outlawed by the Competition Law were widely practiced for many years. With the adoption of the competition law, these well-established practices were suddenly declared illegal. In this situation, it is expected that society, business and the judiciary would be unfamiliar with the purposes and concepts of competition law. Misunderstandings, such as that the competition authority exists to combat big business and protect, at any cost, small companies, are very common.

143. KPPU identifies public trust and confidence in the authority as an important asset in implementing competition policy. In order to gain and maintain public support, the KPPU prioritises cases that directly and substantially benefit the public or consumers.

144. A positive KPPU initiative in this direction was the launching of a newsletter and establishment of the KPPU's website. Such measures provide for transparency and accountability that in turn increase public trust in the body.

145. Most competition problems in Indonesia stem from Government actions. State-created monopolies were ubiquitous in the Suharto era and many continue to exist due to local government regulations. Many public policy makers and regulators are unfamiliar with the goals or benefits of competition policy. Moreover, they are not used to incorporating competition as a goal of their public policy. In response to the KPPU's advocacy, the prime minister's office established a special unit to evaluate the competitive effects of certain government policies.

146. More competition advocacy is not yet complete. Certain import rules are flagrantly damaging to competition: for example, products such as textiles, garments, shoes, toys and food can only be imported through five specific ports and by registered importers that are jointly appointed by the Ministries of Trade and of Agriculture.

147. The KPPU tries to create and maintain close relationships with and get support from the government and sector regulators. The KPPU issues policy advice and recommendations to the Government (central and regional) on all public policies identified as potentially distorting to competition. The KPPU has offered more than 60 recommendations to forestall the creation or do away with monopolies created by government regulation. The KPPU reports some positive results and responses from such initiatives.

148. The KPPU recommendations come from economic studies of the most important sectors in the economy such as telecommunications, insurance and pharmacies. Port facilities are a major particularly the determination of the Terminal Handling Charges (THC), which has wider implications for the cost of Indonesian exports.

149. Examples of regulations and decrees contrary to competition law objectives are the protection of traditional retail conferred by the Regulation of the President of the Republic of Indonesia No. 112-2007 concerning Organisation and Directions of Traditional Markets, Shopping Centres and Modern Stores and Decree No. 53 Year 2008 concerning Guidance on Arrangement and Management of Traditional Market, Shopping Centre, and Modern Retail.

150. The regulation establishes operational conditions such as zoning restrictions consistent with spatial planning legislation, restrictions on opening hours, parking conditions, sanitary regulations, rules on negotiations between suppliers and retailers and the requirement to establish partnership with small and medium entrepreneurs (SMEs).

151. The retailer categories (traditional, minimarket, supermarket, hypermarket, shopping centres) are mainly defined by their size, traded goods, and type of service - if self-service or clerk-service. The size categories and type of service definitions are similar to those used in most countries. Moreover, the regulation follows the rules adopted by developed countries such as France and Germany, especially the zoning policy and the regulation of the contracts between retailers and suppliers.

152. According to Newsletter vol. 1, 2009:6, the KPPU recommended the adoption by Government of a regulation to address two retail problems: a) the rapid growth of modern retail *vis-a-vis* the traditional retail, and b) the “terms of trading” adopted by the modern retail in their relationship with suppliers.

153. The KPPU supported the Decree n. 112 and Decree n. 53 arguing that the regulations provide a more balanced field for traditional and modern retail competition. The KPPU argues that “*This is due to lack of capital ability by traditional market to compete with modern store and hypermarket*”.

154. The KPPU Newsletter recognises that the zoning policy restricts competition, by protecting the traditional retailing from the head-to-head dispute with the modern retailer. Moreover, the zoning rules limit the number and overall size of operations of modern retailers.

155. The Regulations on “terms of trading” seeks to reduce the buyer power of modern retailers. In this context, the KPPU argues that even if the regulation negatively affects competition, the Government can make any intervention if the market mechanism may harm the community. In this case, the traditional retailers and suppliers comprise the community. Few comments are made regarding the consumer. It is assumed that the regulation also guarantees lower price and more choices to consumers. The mechanism to achieve this result is not explained, though.

156. Neither the regulations, nor the KPPU recommendation address the differences in size and strategies of the modern retailers. There is no distinction between local modern retailers with a few stores or modern retail international chains. The buyer power or market power of big chains, chains or independent supermarkets are quite different. All of them are subject to the same restrictions of “terms of trade” and zoning restrictions.

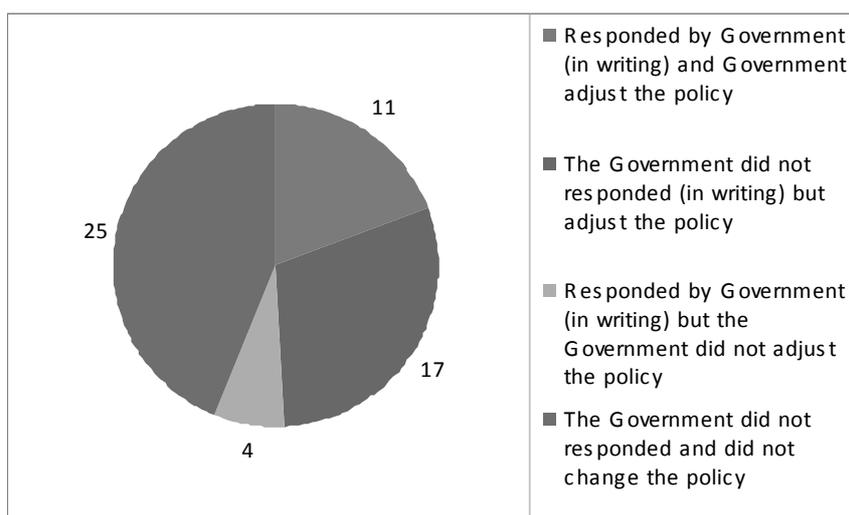
157. As already mentioned, the KPPU supported the new rules but issued a recommendation. According to KPPU, prices in the traditional retail and supermarkets are more or less the same. However, despite the fact that all retailers are subject to the same sanitary rules, shoppers generally find shopping at supermarkets to be more pleasant, clean and convenient, particularly in the rainy season. By protecting the traditional retail channel, the regulation deprives the low-income population of a more comfortable and cleaner shopping experience. The cost of enforcing the regulation is not low and there is no guarantee that this kind of regulation effectively protects the traditional retail channel. The Presidential Decree may protect small businesses but not consumer welfare.

158. In another case of regulation, KPPU concluded that the Government had for several years guaranteed monopoly status to a firm exporting mango fruit to South Korea in return for investment in Indonesia. In 2005, KPPU made a recommendation to the government to end this policy. The Government changed it and abolished the monopoly rights.

159. The Salt distribution policy was also amended following KPPU’s advice. Regional and central government had different policies with respect to salt distribution, and such inconsistency created an artificial barrier to entry in this market. The restriction imposed by local governments was suppressed after KPPU’s advocacy initiative.

160. From 2000 to 2009, 50% of KPPU's recommendations resulted in a positive response. Nevertheless, many of them are not followed by the government and this is still a challenge for competition enforcement and implementation in Indonesia.

**Graph 2: Recommendations to the Government**



161. The State also sets the prices in important economic sectors such as petroleum and gas, although the Law says that the prices are determined by the market. Consumers and public transport are subsidised.

162. The Co-ordinating Minister of Economic Affairs has supported the KPPU's competition advocacy to other Ministers. KPPU organised a workshop for Ministers with the support of the Co-ordinating Minister to discuss the competition consequences of government regulations. However, most of the problems are with local governments and the KPPU does not have the capacity to address a myriad of local government-created monopolies. Moreover, local governments are independent.

163. Presidential Decree 75 of 1999 allows the Commission to open regional branches. This may be a way to monitor regional government initiatives that may distort competition as well as anticompetitive practices at the local level. On the other hand, regional offices are costly. A close relationship and co-operation with the public prosecutor's office and local authorities may also address the problem of local competition.

164. The environment at the end of the 1990s was not competition policy friendly. The main sectors were controlled by monopolies. At that time economic research on antitrust started to be stimulated in Indonesia. Academics were involved from the very beginning of the competition policy implementation. According to an academic researcher, the number of economists with knowledge of competition law is growing,

165. For more than 5 years, the departments of economics of the universities have offered courses in industrial organisation economics and competition matters. There is a research programme on competition issues at the university, carried out by independent institutes of research and consultancies. Competition studies started before the KPPU were developed and funded by international organisations such as GTZ, World Bank, and Japan's International Co-operation Agency (JICA). The Commission reported that the KPPU and several academics are to prepare a textbook on competition law aimed to be used as a standard curriculum for all universities nationwide.

166. The successful enforcement of the competition law in the district courts depends on the continuing education of judges. Most judges are still unfamiliar with competition issues although the situation should improve because in the last three to five years most law schools have begun to offer courses on competition law.

167. Surprisingly, judges accepted to come to the KPPU to learn about competition issues. This was endorsed by the Chairman of Supreme Court, who also recognised that in addition to the district courts judges, Supreme Court judges also need to learn about competition issues.

168. Conferences for the media bring many journalists to discuss competition issues. Every week, the KPPU meets with journalists to discuss the most recent cases or recommendations.

#### **4. International Co-operation and Technical Assistance**

169. The KPPU and other Indonesian institutions have benefited from a variety of bilateral and multilateral technical assistance programmes. Capacity building of KPPU technical staff has been facilitated by bilateral co-operation with the German Bundeskartellamt, United States Federal Trade Commission, Japan Fair Trade Commission, Korea Fair Trade Commission, Chinese Taipei Fair Trade Commission, and the Australian Competition and Consumer Commission and UNCTAD. These institutions have also facilitated training programmes for academics and judges, among others. Furthermore, in 2007 members of the Supreme Court received technical assistance related to competition law from Germany and visited the Bundeskartellamt, the European Commission's (EC) Competition Directorate and the European Court of Justice. This kind of initiative is quite unusual for Supreme Courts to undertake and must be encouraged.

170. Multilateral assistance has included KPPU participation in International Competition Network (ICN) programmes to enhance competition policies in young jurisdictions, in partnership with the Japan Fair Trade Commission (JFTC). Moreover, KPPU has benefited from in-depth evaluations such as those by JICA and OECD. KPPU was an observer at the OECD Competition Committee for two periods. KPPU is a member of several international organisations concerned with competition, namely the ICN, the ASEAN Expert Group on Competition, and the East Asia Competition Forum.